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No. 554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

POPEIL BROTHERS, INC.,

Petitioner,

vs.

KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:
Art. 1 §8:

"The Congress shall have Power * * *

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *"

FORMER PATENT ACT RECOVERY SECTIONS
Section 70 U. S. C. Prior to 1946:

"The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. If on the proofs it shall appear that the complainant has suffered damage from the infringement or that the defendant has realized profits therefrom to which the complainant is justly entitled, but that such damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is here-

by declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony; and upon such evidence and all other evidence in the record the court may adjudge and decree the payment by the defendant to the complainant of a reasonable sum as profits or general damages for the infringement. • • •" (42 Stat. 392, 35 USC Sec. 70 (1940 Ed.))

Section 70 U. S. Code 1946 to 1952:

"The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interest, as may be fixed by the court. The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.

"The court is authorized to receive expert or opinion evidence upon which to determine in conjunction with any other evidence in the record, due compensation for making, using, or selling the invention, and such expert or opinion evidence is declared to be competent and admissible subject to the general rules of evidence applicable thereto. • • •" (60 Stat. 778, 35 USC 70 (1946 Ed.))

The Patent Act, 35 U.S. Code, Sections as follows:

"§134. *Appeal to the Board of Appeals*

"An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Appeals, having once paid the fee for such appeal. July 19, 1952, c. 950, §1, 66 Stat. 801."

"§141. *Appeal to Court of Customs and Patent Appeals*

"An applicant dissatisfied with the decision of the Board of Appeals may appeal to the United States Court of Customs and Patent Appeals, thereby waiving his right to proceed under section 145 of this title. A party to an interference dissatisfied with the decision of the board of patent interferences on the question of priority may appeal to the United States Court of Customs and Patent Appeals, but such appeal shall be dismissed if any adverse party to such interference, within twenty days after the appellant has filed notice of appeal according to section 142 of this title, files notice with the Commissioner that he elects to have all further proceedings conducted as provided in section 146 of this title. Thereupon the appellant shall have thirty days thereafter within which to file a civil action under section 146, in default of which the decision appealed from shall govern the further proceedings in the case. July 19, 1952, c. 950, §1, 66 Stat. 802.

"§142. *Notice of appeal*

"When an appeal is taken to the United States Court of Customs and Patent Appeals, the appellant shall give notice thereof to the Commissioner, and shall file in the Patent Office his reasons of appeal, specifically set forth

in writing, within such time after the date of the decision appealed from, not less than sixty days, as the Commissioner appoints. July 19, 1952, c. 950, §1, 66 Stat. 802.

"§143. *Proceedings on appeal*

"The United States Court of Customs and Patent Appeals shall, before hearing such appeal, give notice of the time and place of the hearing to the Commissioner and the parties thereto. The Commissioner shall transmit to the court certified copies of all the necessary original papers and evidence in the case specified by the appellant and any additional papers and evidence specified by the appellee and in an ex parte case the Commissioner shall furnish the court with the grounds of the decision of the Patent Office, in writing, touching all the points involved by the reasons of appeal. July 19, 1952, c. 950, §1, 66 Stat. 802.

"§144. *Decision on appeal*

"The United States Court of Customs and Patent Appeals, on petition, shall hear and determine such appeal on the evidence produced before the Patent Office, and the decision shall be confined to the points set forth in the reasons of appeal. Upon its determination the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office and govern the further proceedings in the case. July 19, 1952, c. 950, §1, 66 Stat. 802.

"§145. *Civil action to obtain patent*

"An applicant dissatisfied with the decision of the Board of Appeals may unless appeal has been taken to the United States Court of Customs and Patent Appeals, have remedy by civil action against the Commissioner in the United States District Court for the District of Columbia if com-

menced within such time after such decision, not less than sixty days, as the Commissioner appoints. The court may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the Board of Appeals, as the facts in the case may appear and such adjudication shall authorize the Commissioner to issue such patent on compliance with the requirements of law. All the expenses of the proceedings shall be paid by the applicant. July 19, 1952, c. 950, §1, 66 Stat. 803."

§282. *Presumption of validity; defenses*

"A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

"The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

"(1) Noninfringement, absence of liability for infringement or unenforceability.

"(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability.

"(3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title.

"(4) Any other fact or act made a defense by this title.

* * *"

"§284. Damages

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

"When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

"The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances."

(The Court Of Appeals Opinion Of Which Review Is Prayed)

(7 Cir., 318 F.2d 701, 137 USPQ 694).

ZYSSET et al. v. POPEIL BROTHERS, INC.

Nos. 13939, 13940, 14007

June 3, 1963

[Paragraph Numbers Supplied]

Before SCHNACKENBERG, CASTLE, and KILEY, *Circuit Judges.*

CASTLE, *Circuit Judge.*

[1] Karl Zysset, patentee, and New-Nel Kitchen Products Company, his licensee, sued Popeil Brothers, Inc., for infringement of Zysset Patent No. 2,782,826. A trial restricted to the issues of validity of the patent and its infringement resulted in a judgment for the plaintiffs entered in October 1958. Defendant's appeals from that judgment, and from the District Court's denial of a subsequent motion for relief therefrom on the basis of newly-discovered evidence, were considered by this Court in *Zysset* v. *Popeil Brothers, Inc.*, 7 Cir., 276 F.2d 354, 124 USPQ 250, cert. den., 364 U.S. 826, 127 USPQ 555. A detailed description of the Zysset device, a vegetable shredder or chopper, and its manner of operation, together with the claims of the patent, are set forth in that opinion (pp. 355-356, 124 USPQ at 250-251) and need not be repeated here. This Court affirmed,[1] except as to claim 1, the judgment order of the District Court finding the Zysset patent to be valid and infringed and enjoining the defendant from further infringement.

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[1] Opinion filed February 11, 1960; modified and rehearing denied April 14, 1960, 125 USPQ 152; mandate issued May 18, 1960.

[2] On the subsequent trial of the issue of plaintiffs' damages, and of the defendant's counterclaim for breach of contract and unfair competition, the District Court awarded judgment for the plaintiffs for $182,325.38, representing $126,103.12 for damages and $56,222.26 for plaintiffs' attorneys' fees and disbursements, and for costs. The judgment was entered July 13, 1962.

[3] Prior to the trial of the issue of plaintiffs' damages the defendant on December 29, 1960, filed a motion[1] seeking that the accounting which the District Court had ordered be terminated and that a final judgment be entered for nominal damages. This motion was grounded on the contention that claim 2, the remaining claim of the patent in suit, lacked novelty and patentable invention over Wilson & McCahay Patent No. 207,146, presented as a newly discovered prior-art reference. The motion was heard on its merits and denied.

[4] Both plaintiffs and defendant appealed from the July 13, 1962 judgment. Subsequently, on November 5, 1962, the defendant filed in the District Court a second motion for relief from judgment on the basis of certain Swiss patents presented as newly discovered evidence of prior art invalidating the Zysset patent.[2] The motion was denied.

[5] Plaintiffs on their appeal (No. 13939) contend that the damages awarded are inadequate. Defendant on its

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[1] The motion although captioned "Motion For Mitigation Of Damages Or For Application Of The Rule *De Minimus Non Curat Lex*" was on defendant's motion treated as a motion under Rule 60(b) (2), Federal Rules of Civil Procedure (28 U.S.C.A.), for relief from the October 1958 judgment of validity and infringement.

[2] The motion prayed for issuance of a certificate to this Court requesting a remand of the cause pursuant to the procedure outlined in *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 7 Cir., 281 F.2d 252, 260-261, 126 USPQ 318, 326.

cross-appeal (No. 13940) and on its appeal (No. 14007) contends that the court erred in denying the defendant's respective motions for relief from judgment on the basis of newly discovered evidence—erred in not holding claim 2 of the Zysset patent invalid—and, in any event, that the court erred in awarding attorneys' fees and disbursements, and costs, to plaintiffs.

[6] Contrary to the interpretation defendant seeks to place on *Zysset* v. *Popeil Brothers, Inc., supra*, upon which faulty premise defendant bases the relevancy of its newly cited prior-art references, it is abundantly clear that it is the single-piece sinuous blade in combination with the sinuous slot of the wiper cup, the housing, indexing feature and torsion clutch, all of which are included in claim 2, which was held to constitute patentable invention. It is the *combination* which was held valid and infringed —not any particular element thereof, *per se*. In *Zysset* v. *Popeil Brothers, Inc.*, it was pointed out (276 F.2d 354 at 357, 124 USPQ 250, 252) that the sinuosity of the blade and slot in the wiper cup was an important element in the "combination claimed in the patent" and that:

> "It eliminated the problem of particles wedging between multiple blades without loss of the advantage of the additional chopping surfaces, and in *combination* with the indexing feature produced a result beyond that of mere mechanical improvement over existing art. A novel idea was incorporated. While it took mechanical skill to adapt the idea to practical use, and although the mechanics employed may have been obvious, the idea was not. It possessed the 'impalpable something which distinguishes invention from simple mechanical skill.' *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 71 S.Ct. 127, 129, 95 L.Ed. 162, 87 USPQ 303, 305." (Emphasis supplied.)

[7] We deem it unnecessary for the purposes of this case to consider or pass upon the propriety of the District Court's action in entertaining the defendant's motions of December 29, 1960 and November 5, 1962, either from the standpoint of their timeliness under the limitations of Rule 60(b),* or in view of the previous mandate of this Court affirming the validity of the patent claim the motions attack anew. Apart from such considerations we are not persuaded by defendant's contentions that its failure to produce the newly cited prior-art references at the 1958 trial on the issue of validity was not due to lack of diligence on its part. But more important we perceive nothing in this newly tendered prior art which requires a change in the original conclusions of law and judgment with respect to the validity of claim 2 of Zysset Patent No. 2,782,826.

[8] The newly cited prior-art reference relied upon in connection with defendant's December 29, 1960, motion is Wilson & McCallay Patent No. 207,146 covering a device for use in cutting plug tobacco during the process of manufacture, the object being to cut pieces of plug tobacco in a zigzag or curved form to facilitate the adherence of the sections one to another when subjected to pressure in the finishing process and to enable consumers to identify the manufacturer by the shape of the pieces. Curved or zigzag knives were employed in the cutter-head, and between them correspondingly-formed clearing plates. After a cut is made the pieces are separately covered with a wrapper and then brought together under pressure to form a single plug which can be broken apart for the retail trade. Except for disclosing a sinuous type of knife blade Wilson & McCallay is no better a prior-art reference than those originally cited, and considered and rejected.

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* Cf. *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48, 57 USPQ 471, 491.

in *Zysset* v. *Popeil Brothers, Inc., supra.*[5] Its disclosure of a sinuous blade and a clearing plate is not an anticipation of the *combination* of Zysset. Nor is Wilson & McCallay addressed to either the purpose or problems of Zysset. It uses a plurality of knives in a single cutting operation to obtain pieces of desired shape so that they will adhere when re-united and when eventually re-separated will serve to identify the product. It is not a shredder or chopper using a single sinuous blade in repeated cutting operations, each from a different position than the previous cutting stroke, and incorporating the combination of features which endowed Zysset with the quality of invention over the separate elements employed.

[9] The newly cited prior-art references now relied upon by defendant in connection with its November 5, 1962, motion consist of Galant, Swiss Patent No. 261,313 and Hofmann, Swiss Patent No. 265,458.[6] Neither of these discloses or anticipates the *combination* of Zysset. Galant, a fruit and vegetable cutter, and Hofmann, an onion chopper, each disclose a wiper or brush-off plate through which operate multiple straight blades set at an angle to each other. Except for disclosure of a wiper they are no better prior-art references than those originally relied upon.

[10] Defendant's contentions with respect to the disclosures of Wilson & McCallay, Galant and Hofmann are

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[5] See 276 F.2d 354, pp. 356-357, 124 USPQ 250, 251, for prior-art references considered and rejected.

[6] Defendant's motion also tendered Piller, Swiss Patent No. 272,785 as newly discovered evidence but defendant abandoned such assertion when it was revealed that it had been cited in an interrogatory answer filed by plaintiff Zysset in May 1958. Piller, an onion cutter, like Galant and Hofmann, had a wiper but the multiple blades were slightly curved.

predicated upon its faulty assumption that it is one element, or something less than the whole of the combined elements, which is relied upon in Zysset to constitute patentable invention. And such is not the case.

[11] On the question of defendant's diligence in the discovery of these belated references it is noted that all three of the newly cited patents are shown by the record to be classified, and copies thereof physically present, in the same Patent Office classification, Class 146, Subclass 160, as Zysset Patent No. 2,782,826. Defendant attempts to negate lack of diligence on its part in connection with its failure to originally cite Galant and Hofmann by reference to an affidavit by a Washington, D.C., patent attorney that although Galant was received in the Patent Office in 1949 and Hofmann in 1950, the affiant, in 1962, could find no reference in the routing records of the Patent Office Library to show that they had been referred to Division 5 which issued the patent in suit although they were then in the files of such Division. But the lack of a record of such routing does not serve to establish that these two Swiss patents were not available in Class 146, Subclass 160 and that a proper search prior to the 1958 trial on the issue of validity would not have revealed them. It does not serve to excuse what on its face shows lack of diligence on defendant's part in so far as discovery of this particular, although worthless, prior art is concerned. Defendant offers no valid reason to excuse its apparent lack of diligence with respect to the discovery of Wilson & McCallay, similarly a reference of no import. As to Wilson & McCallay, defendant appears to rely on the faulty premise that it was not until the opinion of this Court in *Zysset v. Popeil Brothers, Inc.*, 276 F.2d 354; 124 USPQ 250, that Wilson & McCallay became of significance. But such argument falls with the premise, heretofore demonstrated unsound upon which it is based.

[12] We perceive no error in the District Court's denial of defendant's motions for relief from judgment. We proceed to consideration of the issues presented in connection with the damages awarded and the allowance of attorneys' fees and costs.

[13] A statement of account filed by the defendant pursuant to order of the District Court discloses that it manufactured and sold 3,152,578 infringing food choppers. The dollar amount of such sales is stated to be $2,981,464.70. On the basis of cost items set forth in the statement of account the court found that the net profit accruing to the defendant from the manufacture and sale of infringing devices was $455,293.01, in the computation of which amount deductions as costs, objected to by the plaintiffs but allowed by the court, were made in the amount of $42,830.59 representing expenses incurred by defendant for attorneys' fees and disbursements in this litigation, $109,192.44 representing a proportionate allocation to the infringing products of the compensation paid to defendant's officers, and $29,356.08 representing a loss sustained by the defendant in connection with the sale of the infringing devices during the period commencing August 1, 1959, and terminating February 12, 1960. Although all three deductions were allowed by the court in its findings, in its conclusions of law the court concluded that a "defendant's costs of litigation, * * * and salaries of officers in a closely held corporation are not properly deductible in arriving at the net profits".

[14] The District Court found that an award to plaintiffs based only upon a reasonable royalty would be in conformity with the law; that upon the basis of the testimony a fair royalty payment would be 4 cents for each of the infringing devices sold by defendant; and that an award to plaintiffs based upon such reasonable royalty "would

together with attorneys' fees,[7] be adequate compensation for defendant's infringement. The $182,325.38 judgment entered for the plaintiffs represents such royalty and attorneys' fees.

[15] The plaintiffs contend that the court erred in not measuring their damages by defendant's profit from the sales of infringing devices computed without allowance of the deductions for cost to which objections were made. The defendant contends that on the facts and circumstances presented by the record an award of damages measured by its profit is not warranted. It further contends the court erred in allowing plaintiffs their attorneys' fees and disbursements— that the record does not show the "exceptional circumstances" requisite to the justification of such allowance,[8] nor did the court make a specific finding as to the existence of such circumstances. And that 35 U.S.C.A. §288 precludes allowance of costs to plaintiffs.

[16] The statute governing damages in patent infringement cases, 35 U.S.C.A. § 284, in so far as here pertinent, provides:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonably royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."

[17] The statute prescribes a reasonable royalty as the minimum measure of damages. But it does not pur-

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[7] The reasonableness of the attorney's fees and disbursements claimed were stipulated, but not their allowance.

[8] 35 U.S.C.A. § 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

port to restrict the allowance of damages measured by the infringer's profits where proof of such profits can be and is made, and where under the principles recognized in the decisions such measure of damages is otherwise proper. In this connection we agree with the observation made in *Wm. Bros. Boiler & Manufacturing Co.* v. *Gibson-Stewart Co.*, 6 Cir., 312 F.2d 385, 386, 136 USPQ 239, 240, to the effect that in such a case "if profits are susceptible of determination, no royalty should be awarded".

[18] The action of Congress in adding its sanction to the already judicially approved use of a "reasonable royalty" to measure damages for infringement (Cf. *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U.S. 641, 648), and establishing such measure as marking the minimum below which such damages should not fall, certainly evinces no intention to substitute "reasonable royalty" as an exclusive measure of damage. This is fully borne out by the record of the committee hearings on the proposal to add the provision relative to reasonable royalty to 35 U.S.C. § 70, the section from which present § 284 is derivative.

[19] An infringer's profits are a traditional measure of damages. *Coleman* v. *Holly Mfg. Co.*, 9 Cir., 269 F.2d 660, 663, 122 USPQ 559, 560-561. Such profits may be the measure of damages suffered, even though the statute does not prescribe that "profits" are to be recovered as such. *Graham* v. *Jeoffroy Mfg.*, 5 Cir., 353 F.2d 72, 74, 116 USPQ 542, 543. But whether an infringer's profits are to be utilized as the measure of the damages ade-

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[9] Hearing on January 29, 1946 on HR 5231, House Committee on Patents, 79th Congress, 2d Session, pp. 7, 11, 17-19, 21. Senate Committee on Patents, Report No. 1503, July 14, 1946, 1946 U.S. Cong. Service, pp. 1386-7. And see: 94 Cong. Record 1857 (1946).

quate to compensate for the infringement" to be awarded pursuant to § 284 must, in our opinion, depend upon the facts of the individual case. Cf. *Ric-Wil Co.* v. *E. B. Kaiser Co.*, 7 Cir., 179 F.2d 401, 407, 84 USPQ 121, 126-127.

[20] Here the actual profits of the defendant were determinable and were evidenced by defendant's own accounting. Unless the nature of the case makes the employment of such measure of damages improper or inequitable it should apply. In its infringing choppers defendant employed the combination of Zysset. There is nothing in the record to support a claim that the marketable value of the infringing devices was attributable to some other feature, patented or unpatented. Thus there was no need to establish, as was the case in *National Rejectors, Inc.* v. *A. B. T. Mfg. Corp.*, 7 Cir., 188 F.2d 706, 709, 89 USPQ 508, 511; where the infringing device incorporated other features licensed under other patents, what the Court there characterized as the "rarity" of the entire marketable value of the infringing device being solely attributable to but the one patented feature—the improvement of one of the parts of the mechanism, covered by plaintiff's patent, in order to justify an award of the defendant's entire profits to the plaintiff. That "[u]nder such circumstances, the entire profits belong to the plaintiff", does not limit the application of the rule to such situations nor militate against its application here.

[21] The District Court's rejection of profits as a measure of damages and its adoption of what it found from the evidence to constitute a reasonable royalty, which together with attorneys' fees, would provide "adequate compensation for defendant's infringement" appears to be predicated upon its finding, 134 USPQ 222, 229, that

"• • • [T]his is one of those rare cases in which an infringement has been a blessing in disguise; that only the skill, salesmanship and business acumen of defendant and its principal officer, Samuel Popeil, has brought a financial reward to the plaintiff in the form of a fortuitous windfall if this judgment is finally collected. • • •"

[22] The record does disclose that defendant was industrious in the pursuit of its infringing activities and through employment of demonstration techniques and a "sales pitch" sought to fully exploit the marketability of food choppers incorporating the combination features of the Zysset patent. But it took no skill to infringe, and it required no unusual business acumen to recognize the existence of a wide-spread market for such a household device, and the possibility of profit inherent in its marketing. The inference that it was only the "salesmanship" of the defendant that enabled it to dispose of 3,152,578 infringing choppers for $2,981,464.70 during the period of its infringement of the Zysset patent is without substantial support in the record. Comparison of comparable production[10] periods of the defendant and New Nel, the plaintiff-licensee, shows no great disparity in the sales of either. Moreover, when after February 12, 1960, the defendant altered its remaining stock of infringing choppers to make them non-infringing, and manufactured only non-infringing choppers, they were being given away with the purchase of one of defendant's other products, a salad maker.

[23] But, in any event, the defendant's financial "success" in reaping profits as an infringer does not in our opinion afford a basis for relegating the plaintiff to

[10] Defendant did cheapen the construction of its infringing choppers and by successive price reductions culminating approximately 50% achieved an increased sales volume

recovery of but the statutory minimum measure of damages—a reasonable royalty.

[24] From our examination of the record we conclude that the District Court erred in not awarding plaintiffs damages measured by defendant's profits from infringement. The court did make findings with respect to such profits. It is unnecessary to a proper consideration and disposition here that further findings be made. We need but consider whether the court in its computation of profits erred in allowing the deductions to which plaintiffs objected.

[25] The deduction allowed for expenses incurred by defendant for attorneys' fees and disbursements in this litigation was improper. *Graham* v. *Jeoffroy Mfg.*, 5 Cir., 253 F.2d 72, 76, 116 USPQ 542, 545; *Oil Well Improvements Co.* v. *Acme Foundry & Machine Co.*, 8 Cir., 31 F.2d 898, 900; Cf. *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 7 Cir., 279 F. 648, 660, 677.

And the loss sustained by the defendant when it drastically reduced the price of its infringing choppers toward the termination of the infringement period was not a permissible deduction from the profits it had theretofore made. *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U.S. 448, 457-458, 29 USPQ 306, 310; *Starr Piano Co.* v. *Auto Pneumatic Action Co.*, 7 Cir., 12 F.2d 586, 589.

[26] The $109,192.44 which represents a proportionate allocation to the infringing products of the compensation paid to defendant's three corporate officers, who are the owners of the corporation, is not a permissible deduction. *Graham* v. *Jeoffroy Mfg.*, 5 Cir. 253 F.2d 72, 76, 116 USPQ 542, 545; *Flat Slab Patents Co.* v. *Turner*, 8 Cir., 285 F. 257, 283.

[27] Adjustment of the defendant's profits, as found by the District Court on the basis of defendant's accounting statement, by the elimination of these three deductions which the court allowed over the objections of the plaintiffs, results in the profit figure $636,672.12. It is our conclusion that the plaintiffs are entitled to judgment for that amount.

The District Court's inclusion of plaintiffs' attorneys' fees and disbursements in the judgment it awarded was not predicated upon a finding of "exceptional circumstances" justifying such an allowance under 35 U.S.C.A. § 285—but was ostensibly for the purpose of augmenting the award of damages computed on a reasonable royalty basis. We are of the opinion that the interest of justice do not require that we remand for a finding as to the existence of a basis for an award of attorneys' fees to plaintiffs.

[28] The question of costs is in our view mandatorily governed by 35 U.S.C.A. 288. That section provides:

> "Whenever, without deceptive intention, a claim of a patent is invalid, an action may be maintained for the infringement of a claim of the patent which may be valid. The patentee shall recover no costs unless a disclaimer of the invalid claim has been entered at the Patent Office before the commencement of the suit".

Plaintiffs' disclaimer of claim 1 was not filed until July 12, 1960, long after the commencement of this suit, and subsequent to the determination made by this Court on the appeal of the judgment of validity and infringement (276 F.2d 354, 124 USPQ 250). In view of this the plaintiffs are precluded from recovery of costs in the District Court or upon these appeals. *Liquid Carbonic Co.* v. *Gilchrist*, 7 Cir., 253 F. 54, 58-59; *Gottschalk Mfg.*

Co. v. *Springfield Wire & Tinsel Co.*, 1 Cir., 75 F.2d 907, 908-909, 24 USPQ 423, 424.

[29] In Appeals Nos. 13939 and 13940, the judgment order of the District Court entered July 13, 1962, is reversed in so far as it awards damages and attorneys' fees and disbursements in the sum of $182,325.38, and costs; the cause is remanded to the District Court with instructions to vacate that portion of its judgment order of July 15, 1962, and with directions to enter judgment for the plaintiffs in the sum of $636,672.12, without costs but with interest from the date of its entry.

In Appeal No. 14007, the judgment order of the District Court entered November 13, 1962, is affirmed.

Neither party is allowed costs in this Court in these appeals.

(Earlier Opinions In The Case)

ORIGINAL OPINION OF DISTRICT COURT ON MERITS

(Caption—Civ. A. No. 57C763)

United States District Court
N. D. Illinois, E. D.

Oct. 3, 1958. (167 F.Supp. 362)

PERRY, District Judge.

This action came before the Court on the Amended Complaint of the plaintiffs against defendant, charging infringement by defendant of United States Letters Patent No. 2,782,826 issued to Karl Zysset, on February 26, 1957. Defendant filed a Counterclaim praying for a declaratory judgment finding the patent in suit to be invalid or not infringed by defendant. The structure charged to infringe both claims of the patent in suit by the Complaint is a food shredder identified herein as Plaintiffs' Exhibit 12. Defendant subsequently amended its counterclaim to ask for a declaratory judgment that a second form of food shredder made by it subsequent to the commencement of this action and identified as Plaintiffs' Exhibits 27 and 28 does not infringe the patent in suit.

Upon full consideration of the record herein, including the testimony of witnesses in open court and the exhibits offered and received in evidence, the Court finds as follows:

Findings of Fact

1. This action was filed on or about April 29, 1957, charging infringement of United States Letters Patent No. 2,782,826 by food shredders or choppers manufactured and sold by defendant since the issuance of said patent on February 26, 1957, the particular product being charged to infringe all of the claims of said patent being identified herein as Plaintiffs' Exhibit 12.

2. The patent in suit was issued to plaintiff, Karl Zysset, of Lyss, Switzerland, and there is no evidence that the patent has ever been assigned by said plaintiff to any other party. On April 2, 1957, Karl Zysset granted to Arthur O. Nelson and Harold Newman an exclusive license under the patent in suit to make, use and sell the patented invention and that exclusive license agreement was transferred, in writing, on July 10, 1957 to New-Nel Kitchen Products Company, of Chicago, an Illinois corporation, party plaintiff herein, as shown in Plaintiffs' Exhibit 5, and the plaintiffs, together, own all of the rights under said patent in suit.

3. Defendant, Popeil Brothers, Inc., is an Illinois corporation and has its principal place of business at Chicago, Illinois.

4. The parties, by their counsel, stipulated that the defendant, prior to the filing of this action, made and sold vegetable shredders or choppers of the type identified herein as Plaintiffs' Exhibit 12 and that evidence showed that defendant made and sold such devices subsequent to issuance of the patent in suit and continued to make and sell such devices after the filing of this action.

5. Before the patent in suit had been granted and issued by the United States Patent Office and while the

application therefor was pending in the United States Patent Office, the defendant purchased in Chicago a vegetable shredder or chopper made in Switzerland under the authority of plaintiff, Karl Zysset, and such device was taken to the office of the defendant company, taken apart and carefully examined by defendant as to the form of its manufacture and method of operation. Said device so purchased by the defendant and marked Plaintiffs' Exhibit 6 was used by defendant as the model from which it made production drawings, molds, dies and tools for the subsequent manufacture by defendant of the structures charged to infringe the patent in suit. Only slight changes were made from the commercial structure purchased by defendant to produce the article charged to infringe, such changes as there were primarily being the omission of threads between various elements and the location of the attachment of the blade to the blade-holding bar, both of which were said to have reduced the cost of manufacture but neither of which changed the mode of operation or the results obtained thereby in the commercial structure made in Switzerland and purchased by the defendant in the United States, as exemplified in the device marked Plaintiffs' Exhibit 6.

6. In the patent in suit, there is illustrated and described a vegetable shredder or chopper comprising a two-part, bell-like housing having an upper portion and a lower portion adapted to be placed over the goods to be shredded and a sinuous single-piece knife blade mounted at the lower end of an actuating spring-loaded shaft which is manually depressible to place the several cutting portions of the knife blade into chopping relation with the goods to be shredded. Adjacent the lower end portion of the stem is located a checking member attached to the stem and carrying a sleeve having two diametrical cams

on the outer face thereof, a helical torsion spring disposed in the sleeve and coiled about the stem, one end of the spring being anchored. Inside the top bell-like portion, there is located a socket having a plurality of internal helical grooves. When the stem is depressed, the spring clutch is disengaged and the knife blade does not rotate in its downward movement. However, on its upward movement near the end thereof, the cams on the checking member enter the helical grooves and the stem at that time being engaged by the spring clutch, the stem and the sinuous blade mounted thereon move into a new position, different from the position of the blade as made on the previous chopping stroke. Within the housing is located a wiper plate having a sinuous opening which substantially matches the shape of the blade and vegetable portions which may adhere to the blade are cleared therefrom on the upward stroke wherein the wiper plate wiper such vegetable fragments from the blade. As described in the patent, the checking member comprises a ring seated on the stem portion and a depending sleeve mounted on the ring. However, both in the Zysset commercial form of this device and in the structures charged to infringe, the ring and the sleeve are combined into an integral unit.

7. While in the commercial devices the ring and the sleeve above-mentioned are combined into an integral unit, they perform precisely the same function operating in precisely the same manner as the ring and sleeve separately function and perform as disclosed in the patent for the same purpose and achieving the same result. It is not a departure from the disclosure of the patent for the ring and sleeve to be made in an integral unit instead of in two separate units.

8. The patent in suit is not limited as to the means of mounting the blade on the actuating stem.

9. The claims of the patent in suit contain no limitations as to whether the portions of the bell-like housing are joined frictionally or by threaded engagement nor is there any limitation in either of the claims of the patent in suit as to the manner of mounting the handle knob at the upper end of the stem.

10. After this action had been filed and was at issue, the defendant commenced the manufacture and sale of a second form of vegetable shredder or chopper as to which it sought the declaratory judgment of this Court that such device identified herein as Plaintiffs' Exhibits 27 and 28 was not an infringement of the patent in suit. This device differed from the first form charged to infringe, Plaintiffs' Exhibit 12, primarily in the construction of the checking member which, in the first form charged to infringe, included a spring clutch which in the second form was changed to a plastic ratchet form of clutch having flexible blades which permitted rotation of the checking member relative to the stem in one direction but prevented such relative rotation in the opposite direction. While different in specific form, the ratchet-type clutch was designed and intended and actually operates to perform the same function as the spring clutch used in the first form of defendant's device charged to infringe and performs such function in substantially the same manner, to achieve the same result; that is, to permit partial rotation of the blade at the time the cams on the sleeve enter the helical grooves and to prevent rotation of the blade when the stem is depressed. Like the spring clutch, the ratchet clutch is a well-known simple form of one-way clutching, well known in the art as equivalents for the purpose of preventing rotation of an element in one direction and permitting its free rotation in the opposite direction.

11. Karl Zysset, plaintiff, is engaged in the manufacture in Switzerland and the sale of vegetable shredders under the name of Blitzhacker, made in accordance with the patent in suit and as exemplified in the device marked Plaintiffs' Exhibit 6, illustrated and described in the Blitzhacker circulars, Plaintiffs' Exhibits 8c, 8e, 8f, 8g and 8h. Such devices made in Switzerland were first sold in this country in July, 1954. The other plaintiff, New-Nel Kitchen Products Company, exclusive licensee in this country under the patent in suit, commenced the manufacture and sale of vegetable shredders made in accordance with the patent in suit in the summer or fall of 1957. Its devices are exemplified in Plaintiffs' Exhibits 9, 24 and 30 and are illustrated in the drawing marked Plaintiffs' Exhibit 32 and Plaintiffs' Exhibit 37, and in the circulars marked Plaintiffs' Exhibits 11a, 11b, 11c and 11d.

12. The defendant's vegetable shredders or choppers in both forms presented to the Court are sold under various names, including Chop-O-Matic, Roto Chop and Merry-Go-Round. The first form of defendant's device charged to infringe has been identified herein as Plaintiffs' Exhibit 12 and a cut-open sample thereof has been identified as Plaintiffs' Exhibit 34. These exhibits are illustrated in the drawing Plaintiffs' Exhibit 33. The second form of defendant's device brought into this action by defendant's amendment to its Counterclaim for declaratory relief is exemplified in Defendant's Exhibits 27 and 28, illustrated in the drawing Defendant's Exhibit 32.

13. Defendant published catalog sheets or circulars, three of which are identified herein as Plaintiffs' Exhibits 14, 15 and 15a, which illustrate products of the defendant. This advertising matter is laudatory of the devices, is equally applicable both in illustration and descriptive

matter to all forms of vegetable shredders or choppers made and sold by defendant, and represents that such devices were originated by or invented by the defendant.

14. The plaintiffs objected to bringing into this action the defendant's so-called second form of vegetable shredder or chopper which was first made after the commencement of this suit on the ground that the Court did not have jurisdiction under Title 28, U.S. Code, Section 2201, contending that there had been no actual controversy between the parties relative to such device and that defendant was actually seeking an advisory opinion of the Court. The Court, however, gave defendant leave to bring the said second form of device before the Court for adjudication.

15. The first form of vegetable shredder or chopper made and sold by defendant, Popeil Brothers, Inc. as exemplified in Plaintiffs' Exhibit 12 and Plaintiffs' Exhibit 34, and as illustrated in the drawing Plaintiffs' Exhibit 33, fully responds to and includes the combination of elements set forth in both claims 1 and 2 of United States Letters Patent No. 2,782,826 here in suit.

16. The so-called second form of vegetable shredder or chopper made and sold by defendant commencing subsequent to the institution of this action and exemplified in Defendant's Exhibits 27 and 28 and illustrated in Defendant's Exhibit 32 likewise responds fully to and includes the combination of elements set forth in claims 1 and 2 of said United States Letters Patent No. 2,782,826 here in suit, the ratchet form of the checking means in said second form being the full equivalent of the spring clutch described in the patent in suit and used by defendant in the first form of vegetable shredders or choppers charged to infringe.

17. The defendant has cited a substantial number of prior art patents and publications, Defendant's Exhibits 5a to 5k inclusive, including:

Blake	—	No. 95,309
Hard	—	137,074
Allen	—	267,127
Hansen	—	1,023,517
Hanel	—	2,140,010
Clark	—	2,422,340
Zeller	—	2,623,563
Zysset (Austrian)		180,369
Zysset (German)		235,749
Suter (Swiss)		155,720

and excerpts from the publication "Ingenious Mechanisms".

The Zysset patents referred to in the foregoing group were issued upon the applications of Karl Zysset and do not represent prior art as to the patent in suit.

18. The Hanel patent No. 2,140,010 and the Suter Swiss patent No. 155,720 were expressly considered by the United States Patent Office before grant of the patent in suit and none of the other references in the prior art cited by defendant can be considered as better or closer prior art than those expressly considered by the Patent Office.

19. None of the references cited by the defendant discloses in combination the structure of the patent in suit and it does not appear from any evidence that any of such disclosures would have suggested to a person skilled in the art the vegetable shredder or chopper invented by Karl Zysset at the time of his invention thereof.

20. One of the patents primarily relied upon by defendant in Hanel patent No. 2,140,010 which was ex-

pressly considered by the Patent Office before the patent in suit was allowed, and the Hanel patent does not disclose a structure which will operate to perform the functions desired and intended by the patent in suit. In the Hanel patent, the blade is not advanced in the manner disclosed by the Zysset patent in suit to cut up the food to be chopped in the manner disclosed by Zysset. At the trial, defendant produced Mr. Hanel as a witness, although no previous notice thereof was given to plaintiffs and although no knowledge or structure known to Mr. Hanel, other than that shown in his patent No. 2,140,010 was set up in the pleadings or in any notice as a matter of defense. The only address of Mr. Hanel as to which plaintiffs were given any information either in the pleadings or by notice was the address given in the Hanel patent as Jackson Heights, New York. However, Mr. Hanel testified at the trial that he had not lived in Jackson Heights for a considerable period and that he does reside at R. D. No. 1, Box 242, Iona Lake Road, Franklinville, New Jersey. Over the objections of plaintiffs that there was no basis in any pleading or notice for such testimony, Mr. Hanel testified that in about 1938 he made models of one or more onion choppers, one of which, Defendant's Exhibit 16, corresponded to Fig. 5 of his patent. He also testified that another model, Defendant's Exhibit 12, which he said he had made and which he produced at the trial could have been modified to perform one of the functions of the Zysset patent in suit, namely, rotation of the blade in the latter part of the upward stroke thereof. While plaintiffs' objections to the testimony of Mr. Hanel for lack of notice may have been proper, the Court finds that Hanel's testimony as to what he actually did, even if true and even if properly corroborated, would not have amounted to the combination disclosed and claimed in the Zysset patent in suit. What

Mr. Hänel may now believe that he could have done after he has knowledge of the Zysset patent and its structure is of no consequence.

21. None of the prior art patents or publications anticipates the claims of the patent in suit and it would not have been obvious to one skilled in the art, at the time that any of such prior art disclosures were made, to have made therefrom or in combination with the other prior art patents the invention described, disclosed and defined in the patent in suit.

22. Each of the claims of the patent in suit clearly and definitely defines a combination of elements cooperating together to provide a novel food shredder or chopper possessing many advantages over any of the structures of the prior art.

23. The patent in suit is a clear, concise and exact description of the Zysset invention, in such terms as to enable one skilled in the art to make and use the same.

24. The invention defined by claims 1 and 2 of the patent in suit was not patented or described in any printed publication or patent in this country or any foreign country before the filing date of the patent in suit.

25. The Zysset German patent No. 935,749, Defendant's Exhibit 5i, was not patented in Germany in accordance with the meaning of the United States Statutes, until November 24, 1955, which is the "ausgegeben" or publication date of the German patent, and that is the effective date of said patent for the purposes of this suit rather than the filing date of the German application namely, March 10, 1954, as claimed by defendant.

26. The record contains no evidence of prior invention, public use or sale of the invention described and claimed in the patent in suit prior to the filing date of the application therefor, which would render the patent invalid.

27. The file wrapper of the patent in suit shows that there were no acts, express or implied, taken by the applicant for the patent in suit which create any estoppel or restriction of the claims in suit in so far as their present interpretation is to be made. The claims of the patent in suit as first presented were rejected by the Patent Office because of formal matters only and no amendments or changes were made to avoid prior art which would so restrict either claim of the patent in suit as to avoid infringement by the defendant in its manufacture and sale of devices like Plaintiffs' Exhibits 12 and 34 and Defendant's Exhibits 27 and 28 illustrated in the drawings, Plaintiffs' Exhibit 33 and Defendant's Exhibit 32, respectively.

28. Defendant carried on some negotiations with the representatives of Karl Zysset, plaintiff, for the purchase of the latter's vegetable shredders or choppers or for a license under Zysset's patent rights and therefore knew of the pendency of the application for the patent in suit before it had actually sold vegetable shredders and choppers for which it used a Zysset chopper as a guide or model but such negotiations did not culminate in any agreement between the parties and the terms offered to Zysset by defendant were so low as to make it appear that the defendant never expected or intended that such negotiations would culminate in an actual agreement. With full knowledge of the pendency of Zysset's patent applications, the defendant informed the plaintiff Zysset that it intended to proceed with its manufacture and sale of the vegetable shredder and chopper charged to in-

fringe whether or not it had a license from plaintiff and it proceeded to do so. The Court finds that the defendant deliberately copied the invention of the patent in suit without authority.

29. Plaintiff Karl Zysset granted an exclusive license, Plaintiffs' Exhibit 4, under the patent in suit, to Arthur O. Nelson and Harold Newman who paid $21,000 royalties as down payment thereunder and committed themselves to additional royalties in the amounts set forth in said license. The license was obtained by Arthur O. Nelson and Harold Newman expressly for New-Nel Kitchen Products Company, which was subsequently formed as an Illinois corporation for the purpose of manufacturing and selling the patented invention and such exclusive license agreement was assigned to New-Nel Kitchen Products Company with the approval of Karl Zysset as shown in Plaintiffs' Exhibit 5.

30. The equities in this case are with the plaintiffs, Karl Zysset and New-Nel Kitchen Products Company.

31. The device of the patent in suit has had great commercial success and more than 2,000,000 of such devices have been sold by the defendant and by the plaintiff, New-Nel Kitchen Products Company, in the United States.

32. It was an unfair practice for the defendant to have used the commercial structures made by plaintiff, Karl Zysset, in Switzerland, as models for such devices, to be made by defendant in the United States although it did not constitute an infringement of the patent in suit until that patent had actually issued. Continuance of such practices after the issuance of the patent in suit was an unfair and inequitable act by the defendant in aggravation of the infringement charged.

33. The fact that defendant obtained a patent on its particular form of attachment of the knife blade to the shaft does not avoid infringement of the patent in suit. The particular means of attachment used by defendant is within the scope of both claims of the patent in suit and furthermore constitutes no change in the manner of operation or in the results of operation of the relative structures, both that of plaintiff and its licensee and those of the defendant operating in substantially the same manner to achieve substantially the same result through use of substantially the same means.

34. In addition to its counterclaims for declaratory judgment as to validity and infringement of the patent in suit, defendant filed an "additional counterclaim" herein charging a conspiracy by plaintiffs to engage in acts of unfair competition against defendant and to bring about a violation of an alleged contract between defendant and Arthur O. Nelson. No evidence was presented in support of said counterclaim and the same should be dismissed.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject-matter of this action.

2. Plaintiff Karl Zysset is and has been the owner of United States Letters Patent No. 2,782,826 since said patent was issued to him on February 26, 1957.

3. The plaintiff New-Nel Kitchen Products Company is the exclusive licensee under the patent in suit by virtue of an exclusive license agreement dated April 2, 1957, Plaintiff's Exhibit 4, and the assignment thereof dated July 10, 1957, Plaintiff's Exhibit 5.

4. United States Letters Patent No. 2,782,826 and both of the claims thereof are good and valid in law.

5. Both of the claims of the patent in suit No. 2,782,826 have been and are being infringed by the defendant in the manufacture and sale of devices of the kind exemplified in Plaintiff's Exhibit 12 and Plaintiff's Exhibit 34 and as illustrated in the drawing marked Plaintiff's Exhibit 33 and as exemplified in the devices marked Defendant's Exhibits 27 and 28 and as illustrated in the drawing marked Defendant's Exhibit 32.

6. None of the prior art references discloses the combination of a housing having a socket provided with helical grooves cooperating with an indexing device for advancing a food chopper blade near the end of the upward stroke nor do they disclose a sinuous blade operating through a sinuous slot in a wiper plate. Such a structure as shown and defined in the patent in suit constitutes a patentable invention and the patent in suit was legally and lawfully issued by the United States Patent Office.

7. The Zysset patent discloses an operative structure and clearly describes the construction and operation thereof in such terms as to be clearly understood by those skilled in the art to which the patent appertains.

8. German patent No. 935,749, Defendant's Exhibit 5i, does not constitute prior art against the patent in suit.

9. Plaintiffs are entitled to an injunction restraining the defendant against committing further acts of infringement of either of the claims of the Zysset patent in suit No. 2,782,826 in the manufacture or sale of vegetable shredders of the kind exemplified in Plaintiffs' Exhibits 12 and 34 and illustrated in the drawing, Plaintiffs' Exhibit 33 and as exemplified in Defendant's Exhibits 27 and 28 and illustrated in the drawing Defendant's Exhibit 32.

10. Plaintiffs are entitled to recover from defendant the damages or profits as provided in the patent statutes of the United States which have been occasioned by defendant's infringement of the Zysset patent No. 2,782,826 together with interest thereon and the costs of this suit.

11. Plaintiffs are entitled to an accounting by defendant to determine the damages which plaintiffs shall recover from defendant and the Court, upon appropriate application, will appoint a Master for the purposes of such an accounting. After such accounting has been had, the Court will determine whether in view of the willful nature of defendant's infringement the amount of damages so found shall be increased as provided by statute and the Court shall at the same time determine the amount which shall be allowed to plaintiffs for their costs and disbursements herein. When the amount of the judgment, including costs, shall have been finally determined, plaintiffs shall have judgment therefor and shall be entitled to execution thereon.

12. Defendant is not entitled to any relief under its counterclaims herein, and the same should be dismissed with prejudice and with costs to plaintiffs.

FIRST OPINION OF COURT OF APPEALS

(Caption—Nos. 12492, 12753)

United States Court of Appeals
Seventh Circuit.

Feb. 11, 1960. (276 F. 2d 354)

Rehearing Denied April 14, 1960.

Before SCHNACKENBERG and CASTLE, Circuit Judges, and MERCER, District Judge.

CASTLE, Circuit Judge.

Karl Zysset, patentee, and New-Nel Kitchen Products Company, his licensee, plaintiffs-appellees, sued Popeil Brothers, Inc., defendant-appellant, for patent infringement and unfair competition. Trial of the issues involving validity of the patent and its infringement resulted in a judgment for plaintiffs in the District Court finding the Zysset patent valid and infringed and enjoining defendant from making, using or selling the accused devices or any other embodying the invention of claims 1 or 2 of Zysset patent 2,782,826. The issues involving unfair competition and plaintiffs' damages resulting from infringement remained to be tried.

Defendant appealed and contends that the District Court erred in holding the Zysset patent met the standards required for patentable invention over the non-cited prior art and, in any event, Zysset's claims are narrowly limited and not infringed by defendant's devices. Subsequent to defendant's appeal we remanded to the District Court to

consider new evidence, the District Court having certified that there appeared to be sufficient cause at law to warrant reopening of the District Court's judgment order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. After hearing on remand the District Court found that no new evidence was presented which required change of the Court's original conclusions of law and judgment. Defendant's motion for relief from the original judgment was denied and defendant's second appeal followed.

The contested issues are (1) the validity of Zysset's patent 2,782,826 and (2) whether defendant's accused devices are infringements.

In the Zysset patent, applied for March 11, 1954 and issued February 26, 1957, there is illustrated and described a vegetable shredder or chopper comprising a two-part, bell-like housing having an upper portion and a lower portion adapted to be placed over the goods to be shredded and a sinuous single-piece knife blade mounted at the lower end of an actuating spring-loaded shaft which is manually depressible to place the several cutting portions of the knife blade into chopping relation with the goods to be shredded. Adjacent the lower end portion of the stem is located a checking member attached to the stem and carrying a sleeve having two diametrical cams on the outer face thereof, a helical torsion spring disposed in the sleeve and coiled about the stem, one end of the spring being anchored. Inside the top bell-like portion, there is located a socket having a plurality of internal helical grooves. When the stem is depressed, the spring clutch is disengaged and the knife blade does not rotate in its downward movement. However, on its upward movement near the end thereof, the cams on the checking member enter the helical grooves and the stem

at that time being engaged by the spring clutch, the stem and the sinuous blade mounted thereon move into new position, different from the position of the blade as made on the previous chopping stroke. Within the housing is located a wiper cup or plate having a sinuous opening which conforms to the shape of the blade and vegetable portions which may adhere to the blade are cleared therefrom on the upward stroke during which the wiper wipes such vegetable fragments from the blade.

The claims of the patent are:

"1. In a vegetable shredder comprising a two-part bell-like housing having an upper and a lower portion and adapted to be put over the goods to be shredded, and a knife blade manually depressible by a spring-loaded actuating stem which has a lower end portion, said blade being mounted on the latter and on each actuation being angularly movable by an automatically-operating indexing device, the improved indexing device including a socket in the upper housing portion, said socket having a plurality of internal helical grooves, and a checking member rotatably but axially immovably mounted on the lower end-portion of the stem, said checking member comprising a ring seated on said stem portion, a sleeve mounted on said ring and having two diametrical cams engageable in said grooves, and a helical torsion spring disposed in said sleeve and coiled about said stem portion, one end of the spring being anchored in the sleeve and the other bearing on said ring; the whole in such combination that on depressing the stem the checking member in the first stage is rotated in one direction relatively to the stem and the spring is disengaged from the latter, while the stem and knife blade are not rotated, and that in the last stage of the stem's upward movement the spring engages

the stem and the latter together with the checking member and knife blade are rotated in the other direction

"2. A vegetable shredder as set out in claim 1, in which the knife blade is sinuous, a wiper cup is rotatably but axially immovably mounted in the lower portion of the housing for clearing the blade on the upward stroke thereof, said blade passing through a continuous slot in the bottom of the wiper cup, and a blade-carrying rod passing in tight fit through a plurality of openings in the blade and being secured to the lower end portion of the stem."

The feature contended by plaintiffs to be novel and to constitute patentable invention is the combination of the elements of (1) the repositioning of the chopper blade by automatic rotation occurring only in the last stage of the upward stroke when the blade is withdrawn from and in a position not to move or disturb the goods being shredded or chopped and (2) the utilization of a sinuous blade which although having the advantage of multiple blades eliminates the wedging of particles of the goods between blade sections; the sinuous blade wiping clean on each upward stroke by a continuous sinuous slot in a wiper plate or cup which rotates with the sinuous chopper blade.

The prior art cited to the Patent Office consisted of Hanel 2,140,010 and Suter, Swiss patent 155,720.

Hanel (1938) discloses a housing to be placed over the material to be chopped, a blade, and a stem having a spiral slot cooperating with a sleeve having ears protruding into the spiral slot for giving a rotary motion to the blade. It does not have a sinuous blade, nor a wiper cup, nor are means provided for permitting the blade to travel upwardly in a straight line and away from

the chopped material before the rotary motion is imparted.

Suter (1932) shows merely a blade attached to a stem and handle so that they may be manually worked up and down in an open hollow cylinder having a working base loosely inserted at the bottom. Three blades arranged in the shape of an "N" or a zigzag blade were disclosed. Suter does not disclose a sinuous blade, nor wiper cup, nor any automatic indexing feature.

Prior art not cited to the Patent Office but relied upon by defendant includes Blake 95,309, Hard 137,074 and Clark 2,422,340.

Blake (1869), a meat chopper, disclosed a partial rotation or indexing of the rod and knife blade which does not take place until it is lifted nearly out of the receptacle so that the contents being chopped will not be disturbed by the partial revolution. Hard (1873), another meat chopper, disclosed the same feature. Clark (1947), a food chopper, disclosed a rotation and indexing feature which could by adjustment of the position of a ratchet disc on the rod or stem holding the blade be made to index only on the last stage of the upward stroke.

A 1952 Zeller patent 2,623,563 is illustrative of plaintiffs' exhibit 17, a Zello onion chopper, and similar to plaintiffs' exhibit 16, the Provit device. In these there was a housing and multiple blades which were operated by a stem and knob to chop food. There was no rotation or indexing of the blades although they were wiped by withdrawal into a slotted cup which sheathed them. The blades were not sinuous. Particles wedging between the blades could cause them to stick.

The District Court found that none of the prior art references discloses in combination the structure of the

patent in suit; that it does not appear from any evidence that any of the disclosures would have suggested Zysset's shredder or chopper to a person skilled in the art, and concluded that the structure as shown and defined in the patent in suit constitutes a patentable invention. We agree with the District Court. It applied the correct criteria of invention. The sinuosity of the blade and slot in the wiper cup or plate was wholly novel in concept and an important element in the combination claimed in the patent. It eliminated the problem of particles wedging between multiple blades without loss of the advantage of the additional chopping surfaces, and in combination with the indexing feature produced a result beyond that of mere mechanical improvement over existing art. A novel idea was incorporated. While it took mechanical skill to adapt the idea to practical use, and although the mechanics employed may have been obvious, the idea was not. It possessed the "impalpable something which distinguishes invention from simple mechanical skill". *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 71 S.Ct. 127, 129, 95 L.Ed. 162. Here the sinuous blade constituted invention although found in a combination of other elements which were old in the art.

The evidence on the issue of infringement shows that the defendant manufactured and sold two accused devices. The first form of accused device was copied directly from plaintiff Zysset's shredder with only such slight variations as would effect economy in large scale manufacture. Instead of a plurality of holes in the sinuous blade, which defendant used without other change, it attached the blade to the blade carrying rod by the use of slots rather than to project the rod through holes. A "ring" and "sleeve" described in the claims of the patent in suit were made as one part rather than two. No change in functioning or manner of operation resulted.

Infringement is not avoided by making into one part that which has been shown as two where there is no change in the function or manner of operation of the element.

In this connection it was pointed out in *Specialty Equipment & Machinery Corp.* v. *Zell Motor Car Co.*, 4 Cir., 193 F.2d 515, 518:

> "While it is true that the function of a machine is not patentable and that there is infringement only where the same result is reached by substantially the same or similar means, *Westinghouse* v. *Boyden Power Brake Co.*, 170 U.S. 537, 569, 18 S.Ct. 707, 42 L.Ed. 1136, it is also true that one using the substance and essentials of a patented combination does not avoid infringement by varying nonessential details. Neither the joinder of different elements of a patented combination into one, nor the separation of one integral part into two or more doing together substantially what was done by the single element will evade a charge of infringement."

The rule was expressed by this court in *Apex Electrical Mfg. Co.* v. *Maytag Co.*, 7 Cir., 122 F.2d 182, 187 as follows:

> "Patents are not limited to the structure described and shown, but the invention may be embodied in various forms. A transportation or rearrangement of the parts as set forth in a patent is an embodiment of the patented invention and does not avoid infringement unless form, location or sequence is essential to the result or to the novelty of the claims." (Citing authorities.) "Infringement is not avoided by combining two elements of a claim in one part."

In *Royal Typewriter Co.* v. *Remington Rand, Inc.*, 2 Cir., 168 F.2d 691, 693 the court had occasion to observe:

> "• • • courts have with curious unanimity held that it does not avoid infringement to combine into one member that which the patent discloses as two, if the single member performs the duties of both in the same way. The decisions are so numerous that we confine ourselves to citing those which over the past thirty years we have passed ourselves."

The District Court did not err in its conclusion that the first form of defendant's accused device constituted infringement.

The second form of accused structure merely substituted a nylon ratchet clutch for the helical torsion spring clutch described in the Zysset patent. Other features, including the sinuous blade and wiper plate, are those of plaintiffs' device. The clutch in each instance operates to prevent the stem and blade from rotating except in one direction. This permits rotation to reposition the blade only on the last portion of the upward stroke when the chopper blade is no longer in contact with the goods being shredded or chopped. The utilization of a nylon ratchet and multiple pawl type clutch was from the standpoint of function and manner of operation a mechanical equivalent of the Zysset helical torsion spring type clutch. The conclusion of the District Court that the doctrine of "equivalents" applied, and that defendant's second form of device constituted infringement, was correct. In *Kiwi Coders Corporation* v. *Acro Tool & Die Works*, 7 Cir., 250 F.2d 562, 568 this court in applying the doctrine of equivalents stated:

> "As the Supreme Court said in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 607, 70 S.Ct. 854, 856, 94 L.Ed. 1097, "• • • to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. • • • One who seeks to pirate an invention, like one

who seeks to pirate a copyrighted book, or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement.' In this opinion the Court goes on to point out that the doctrine of equivalents evolved in response to this type of infringement and reiterates (339 U.S. at page 608, 70 S.Ct. at page 856) that 'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.'"

We agree with the District Court that the evidence presented on the hearing subsequent to our remand was not such as to require a change in the original conclusions of law and judgment. We have considered the contentions of the defendant relating to file wrapper estoppel, narrow limitations of Zysset's claims, and the various arguments advanced in support thereof. We find them without merit.

The judgment of the District Court is affirmed.

Affirmed.

Upon Petition for Rehearing

CASTLE, Circuit Judge.

Popeil Brothers, Inc., defendant-appellant, petitions for a rehearing which *inter alia* requests modification so as to order that the District Court be reversed as to its finding and judgment that claim 1 of Zysset's patent 2,782,826 is valid and infringed.

A rehearing is denied. The opinion and order of this Court is modified to show that the judgment of the District Court is reversed as to claim 1 and affirmed as to claim 2 of Zysset patent 2,782,826 and affirmed in all other respects.

FINDINGS AND CONCLUSIONS OF DISTRICT COURT re WILSON & McCALLAY PATENT

(Caption—Civ. A. No. 57-C-763)

United States District Court
N. D. Illinois, E. D.

Oct. 26, 1961. (199 F.Supp. 594)

PERRY, District Judge.

This action came before the court on defendant's Motion for Mitigation of Damages or for Application of The Rule De Minimis Non Curat Lex after the denial of a motion for leave to file interlocutory appeal, under Section 1292(b), 28 U.S. Code, from the court's order of January 17, 1961, witnesses having been heard in open court and counsel for the respective parties having been heard; and upon full consideration of the record herein and the exhibits offered and received in evidence, the court finds as follows:

1. The Wilson & McCallay patent 207,146 relied upon by defendant has a plurality of separated blades fixed in position on the cutter head spaced so as to cut a long plug of tobacco into pieces of equal size, each piece being of a size for retail sale; whereas the Zysset invention is for a vegetable shredder for the purpose of cutting food into small pieces.

2. The Wilson & McCallay blades reciprocate to come into the same position on each stroke and simply enter the same grooves upon each operation. The Wilson & McCallay device is for cutting a plug of tobacco into pieces of particular size and shape and is comparable

in that respect with a cutting die or a cookie cutter rather than a food shredder. The Wilson & McCallay device will not accomplish its purpose with only a single blade because it will not cut a section of a plug of a predetermined size and shape.

3. In the Zysset food shredder, the food must be confined in a housing so that it will be held in position under the blade for repeated cutting as the blade cuts at a different point on each stroke. The wiper cup of the Zysset invention is designed to rotate with the blade for each new position on each stroke. The Wilson & McCallay patent has no such means since the clearing plates are in fixed position and cannot rotate, and the blades cut at the same point on each stroke.

4. In the Wilson & McCallay machine the blades are moved up and down by rotation of a driving shaft D having a crank pin which reciprocates in a slot to change the direction of movement of the cutter head on which the blades are mounted. The blades or knives remain in any position where they are stopped and do not return until the shaft is operated again. The blades or knives in the Wilson & McCallay device are parallel to each other and that results in the wedging of anything coming between the parallel sides rather than the shredding or chopping in small size of any material to be cut.

5. The Wilson & McCallay device has a series of fixed plates which have no slots but between which plates the blades operate to discharge the cut portions of the plug as they rise into the spaces between the clearing plates. In the Wilson & McCallay patent the clearing plates are fixed in position and cannot be moved or rotated by any movement of the blades, whereas in the Zysset invention the wiper cup is rotatable and as the blade turns from

one cutting position to another it rotates the wiper cup. This fact was demonstrated at the trial.

6. The Wilson & McCallay patent is no more pertinent to the issues herein than other prior art patents considered by the court at the trial, including Suter Swiss patent 155,720, Hanel patent 2,140,100, and Zeller patent 2,623,563.

7. The Wilson & McCallay patent 207,146 is in the same Patent Office classification, namely, Class 146, Subclass 160, as the Zysset patent in suit and has been so classified since 1923. Defendant's expert witness testified that the first place anyone interested in and investigating the patent in suit would search would be the class and subclass of the patent under investigation.

Conclusions of Law

1. The Wilson & McCallay patent does not disclose an equivalent of the machine of the Zysset patent in suit.

2. The Wilson & McCallay patent does not anticipate the combination of elements claimed in the Zysset patent in suit.

3. The Wilson & McCallay patent does not limit the scope of Claim 2 of the Zysset patent in suit.

4. Claim 2 of the Zysset patent in suit includes as a part thereof all of the elements defined by Claim 1 of the Zysset patent as well as the additional limitations set forth in Claim 2.

5. Plaintiffs are entitled to recovery of costs and attorneys' fees occasioned by defendant's motion.

6. Defendant's Motion for Mitigation of Damages or for Application of the Rule De Minimis Non Curat Lex should be denied.

FINDINGS, CONCLUSIONS AND JUDGMENT OF DISTRICT COURT re DAMAGES

(N.D. Ill., 134 USPQ 222)

No. 57-C-763 July 13, 1962

PERRY, *District Judge.*

FINDINGS OF FACT

I. On April 29, 1957 plaintiff Karl Zysset filed his bill of complaint herein charging infringement of United States Letters Patent No. 2,782,826, issued February 26, 1957, by defendant's manufacture and sale of vegetable choppers. By leave of court an amended complaint was filed adding as a party plaintiff New-Nel Kitchen Products Company, exclusive licensee under the patent in suit. Prior to the trial in July 1958, defendant manufactured and sold a modified form of vegetable chopper having a nylon ratchet clutch in lieu of the spring clutch embodied in the original form. After a full trial, in Findings of Fact and Conclusions of Law and Judgement filed and entered by the court on October 3, 1958 the court found both forms of defendant's device to constitute infringements of claims 1 and 2 of the Zysset patent in suit. In the Findings of Fact entered by Judge Perry on October 3, 1958 it is stated, "The court finds that the defendant deliberately copied the invention of the patent in suit without authority." (167 F.Supp. 362, 119 USPQ 116) An Order was entered by the court on October 8, 1958 deferring the disposition of the issues of defendant's additional counterclaim relating to alleged unfair competition and breach of contract. The Judgment of the court provided for the recovery of damages and the profits and gains which the defendant made as a result of its infringement, and the court held that the plaintiffs were entitled to recover their costs and disbursements to be determined by the court at the time of determination of

the matter of damages and profits to be awarded to plaintiffs. Defendant filed its Notice of Appeal on October 8, 1958.

On October 27, 1958 New-Nel Kitchen Products Company, party plaintiff herein, as exclusive licensee under the Zysset patent in suit, brought an action in the United States District Court, Northern District of Illinois, Eastern Division, for infringement of said patent against F. W. Woolworth & Company (58-C-1916) based upon the sale of various forms of vegetable choppers made by different manufacturers; and on November 5, 1958 defendant moved in the instant case for a temporary restraining order against the prosecution of said suit, which motion was heard by the court and denied on November 21, 1958. The Findings of Fact, Conclusions of Law and Order thereon herein recited that defendant's petition for temporary restraining order was without equity and that plaintiffs were entitled to recover their costs to be determined at final hearing. (119 USPQ 346, 168 F.Supp. 372)

In the appeal from the Judgment of October 3, 1958, Appeal No. 12,492, upon affidavits of counsel, extensions of time for the filing of appellant's brief were granted to February 12, 1959; but on that date defendant filed, in the United States Court of Appeals for the Seventh Circuit, its motion to remand for consideration of new evidence, namely a patent issued to Samuel J. Popeil on February 10, 1959, No. 2,872,958. The Court of Appeals ruled that the motion to remand be continued for a period of sixty days from February 26, 1959 pending the filing in the District Court of the motion for the consideration of the alleged new evidence. On March 5, 1959 defendant filed its Motion for Relief from Judgment based upon the newly issued Popeil patent. Thereafter,

upon evidence heard in open court, the District Court filed its certificate in the Court of Appeals on April 24, 1959, whereupon the Court of Appeals, on April 28, 1959, ordered the case remanded to the District Court to consider new evidence brought into existence by the issuance of Popeil patent 2,872,958 on February 10, 1959. On July 8, 1959 the District Court filed and entered its Findings of Fact and Conclusions of Law and Order denying defendant's motions for relief from judgment and to consider new evidence. The order held "That no new evidence has been presented to the court which in any way changes its Findings of Fact, Conclusions of Law and Judgment entered in this cause on October 3, 1958." (122 USPQ 128) and provided that plaintiffs are entitled to recover their costs of the proceeding and an allowance for their expenses incurred herein, to be subsequently determined by the court along with other questions of damages, profits, costs and recoveries. Supersedeas bond was fixed in the sum of $5,000.00. On July 13, 1959 defendant filed its Notice of Appeal from the additional Findings of Fact, Conclusions of Law and Order of July 8, 1959, and reinstated its appeal from the Judgment of October 3, 1958 as amended by the Order of October 8, 1958, Appeal No. 12,492. The new appeal to the United States Court of Appeals for the Seventh Circuit numbered 12,753. Appeals Nos. 12,492 and 12,753 were consolidated by the Court of Appeals Order dated September 10, 1959. Said appeals were heard and, on February 11, 1960, the opinion the Court of Appeals was filed finding claims 1 and 2 of the Zysset patent in suit valid and infringed. (276 F.2d 354; 124 USPQ 250.) Thereafter defendant filed its Petition for Rehearing, and, on April 14, 1960, the Court of Appeals denied the Petition for Rehearing but ordered that its judgment be modified to show that the judgment of the District Court is re-

versed as to claim 4 of the Zysset patent in suit and affirmed as to claim 2 and in all other respects. (125 USPQ 152) Thereafter defendant filed its petition in the United States Supreme Court for certiorari to the Court of Appeals for the Seventh Circuit and said petition was denied on October 10, 1960. (364 U.S. 827; 127 USPQ 555)

The decrees of the Court of Appeals having been filed in the District Court on May 18, 1960, the District Court, on May 24, 1960, entered an order reading as follows:

> The Judgment and Order, dated October 3, 1958 and July 3, 1959, respectively, having been reviewed by the Court of Appeals, and the supersedeas granted October 8, 1958 having been vacated; it is,
>
> Ordered:
>
> That all of defendant's books, statements, exhibits, records, vouchers and other documents relating to the above matters, shall be kept intact by the defendant and remain in its possession ready to be produced upon further order.
>
> That defendant be enjoined from disposing of, or wasting or improperly disposing of, any of its assets without order of the court except for such disbursements and expenditures other than cash as are necessary to carry on its normal and ordinary course of business.

On June 30, 1960 the District Court entered an Order pursuant to the opinion of the Court of Appeals dated April 14, 1960 finding claim 1 of the Zysset patent in suit, No. 2,782,826, invalid.

II. On October 18, 1960, District Court entered an Order in the accounting proceeding directing defendant to file a statement of account setting forth the quantity of vegetable shredders found to infringe which defendant had sold, the prices received therefor, and the items of

cost claimed by the defendant. On December 6, 1960, defendant served its statement of account which has been received in evidence herein as Plaintiffs' Exhibit 101.

III. On January 5, 1961 defendant filed its Motion for Mitigation of Damages or for Application of the Rule *De Minimis Non Curat Lex*, and on January 17, 1961 the District Court denied the said motion without adjudication of the merits thereof and also entered an order for an interlocutory appeal from the denial of said motion. The defendant thereupon filed its petition for allowance of an interlocutory appeal under 28 U.S.C.A. 1292(b), and on February 28, 1961 the Court of Appeals denied the said petition. Thereupon defendant renewed its motion to limit damages and the matter was set for the reception of evidence as to United States patent 207,146 issued to Wilson and McCallay and the bearing thereof upon the issues herein, and the testimony in the accounting proceeding was stayed pending the further order of the court. Thereafter evidence in open court was heard and, on September 19, 1961, defendant's Motion for Mitigation of Damages or for Application of the Rule *De Minimis Non Curat Lex* was denied and costs and attorneys' fees occasioned by defendant's motion were assessed in favor of plaintiffs and against defendant, and Findings of Fact and Conclusions of Law were filed and entered in support of said Order. Thereupon defendant moved to vacate the said Findings of Fact and Conclusions of Law entered on September 19, 1961, or in the alternative to amend and modify the same. On October 25, 1961 the District Court entered a new Order and new Findings of Fact and Conclusions of Law in support thereof providing that defendant's motion for mitigation of damages be denied and that costs and attorneys' fees occasioned by defendant's motion be assessed in favor of plaintiffs

and against defendant. (131 USPQ 178) The court required a $10,000.00 bond to insure the payment of plaintiffs' costs and attorneys' fees, and defendant deposited government bonds in that amount with the Clerk of this Court. On November 13, 1961 defendant appealed from the Order of October 25, 1961 to the Court of Appeals for the Seventh Circuit, Appeal No. 13,593. Plaintiffs moved to dismiss the appeal and, on January 31, 1962, the motion was granted at costs of Popeil.

IV. Testimony in the accounting proceeding comprised the following depositions:

Witness	Date	Exhibit No.
Philip Rootberg	1/12/61	PX 102-a
Samuel J. Popeil	1/12/61	PX 102-b
Philip Rootberg	1/19/61	PX 102-c
Philip Rootberg	3/16/61	PX 102-d
Philip Rootberg	11/15/61	PX 102-e
Samuel J. Popeil	11/29/61	PX 102-f
Samuel J. Popeil	11/15/61	PX 102-g

and testimony before the court on February 21, May 8, May 14, May 15, and May 18, 1962.

Arthur O. Nelson and Roy H. Olson testified in behalf of plaintiffs, and Harold Newman and Arthur O. Nelson, counter defendants, were called by defendant, and Messrs. Stanley Hoods, Samuel J. Popeil, John D. Rumbough, and Lawrence C. Kingsland testified in behalf of defendant.

V. The character of the Zysset invention is set forth in the Findings of Fact and Conclusions of Law entered by the District Court on October 3, 1958 and the opinion of the Court of Appeals filed February 11, 1960. As pointed out above, claim 1 of the Zysset patent in suit was found invalid by the Court of Appeals on April 14 1960 but the Judgment of this court, entered on October

3, 1958, was affirmed in all other respects. Therefore, both forms of defendant's devices have been held to be infringements as set forth in the Judgment of October 3, 1958.

VI. Prior to the manufacture and sale of vegetable choppers by the defendant, plaintiff Karl Zysset had manufactured and sold, in this country and in Europe, vegetable choppers embodying the patented invention.

VII. The defendant purchased a sample of Zysset's vegetable chopper, took it apart, examined it, and copied it, as fully established in the record at the trial and in testimony at the accounting proceeding.

VIII. Prior to the issuance of the Zysset patent in suit on February 26, 1957, the defendant Popeil carried on negotiations for the purchase of Zysset choppers which were made by the patentee in Switzerland or for a license under the patent which defendant was informed was about to be granted. Such negotiations commenced in about February 1956 but included a statement by Popeil's attorney that Popeil intended to continue to make the CHOP-O-MATIC devices complained of herein without authority from Zysset.

IX. After it had been found by the Court on October 3, 1958 that defendant had infringed the patent in suit, defendant continued to manufacture and sell its infringing vegetable choppers without change until February 12, 1960.

X. Subsequent to the decision of the Court of Appeals Popeil continued in the vegetable chopper business, manufacturing and selling choppers having the same outside appearance as those enjoined by the court but being modified internally to omit the rotation feature and the wiper cup. For these Popeil continued to use the dies and molds previously employed in the manufacture of

choppers but, at a later time, some of the dies and molds were modified and other changes were made. Mr. Popeil testified that 1,275,000 choppers without automatic rotation and without wiper cups were made and sold by his company.

XI. Arthur O. Nelson and his associate Harold Newman visited Karl Zysset in Switzerland and negotiated the license agreement which has been identified as Plaintiffs' Exhibit 4. It provided for a license for the manufacture and sale of the patented invention upon the following terms:

> For the first year commencing May 15, 1958: Swiss francs—.45 per vegetable shredder on a minimum of 200,000 devices;
>
> For subsequent years, after May 15, 1959: Swiss francs—.45 per device for the first 100,000; Swiss francs—.35 per device for each device in excess of 100,000; Swiss francs—.30 per device for each device exceeding 300,000.
>
> Licensees agree to pay a royalty on a minimum 200,000 vegetable shredders annually commencing May 15, 1958, but Licensor agrees to reduce the 200,000 minimum after May 15, 1961, if Licensees are unable to maintain it. It is understood and agreed that if Licensees are unable to manufacture and sell the minimum of 200,000 devices due to an act of God or other reason beyond their control, upon which proof can be and is supplied by Licensees, Licensees will be relieved of the minimum number requirement and in such case only the devices actually manufactured and sold shall be subject to royalty payment to Licensor.
>
> (A Swiss franc had a value of 23.1c United States currency.)

The License Agreement dated April 2, 1957 (Plaintiffs' Exhibit 4) has not been modified and is in full force and effect. New-Nel Kitchen Products Company has not made final settlement for the royalties accruing since May 15, 1958 but, in addition to the $21,000.00 originally paid, has incurred its attorneys' fees and disbursements in this case amounting to $21,928.26 (up to May 1, 1962) with the expectation of applying them on any unpaid royalties upon the conclusion of this litigation. (That amount does not include Zysset's litigation expense.)

New-Nel manufactured and sold approximately 238,619 of the patented food choppers from the time it started in business after the License Agreement (Plaintiffs' Exhibit 4) dated April 2, 1957 was entered into, until May 15, 1958 which was the end of the period covered by the first royalty payment of $21,000.00 as required by the License Agreement. From May 15, 1958 to February 15, 1962 New-Nel manufactured and sold 289,945 of the patented food choppers.

During the infringing period New-Nel had a capacity for making and selling the patented food choppers of from 2500 to 3000 devices per day, working one shift. With additional shifts, and the acquisition of additional facilities, if needed, New-Nel had ample capacity for the manufacture and sale of the infringing choppers made and sold by the defendant, *i.e.*, 3,152,578 between February 26, 1957 and February 12, 1960.

XII. During the taking of the testimony before the court there were offered and received in evidence the following exhibits. . . .

XIII. The defendant's Statement of Account (Plaintiffs' Exhibit 101) reports the manufacture and sale of 3,152,578 of the infringing food choppers. The amount of

the sales reported is $2,981,464.76. After making certain deductions as set forth in said Statement, defendant reports net profits before income tax of $455,293.01. Plaintiffs accept the defendant's statement of net profit before income tax of $455,293.01 except that plaintiffs object to the deduction from defendant's profits of $42,830.59 for expense of this litigation which is part of the item of "General and Administrative $615,061.32" given in said statement and referred to in the testimony of defendant's accountant Philip Rootberg on November 15, 1961 at page 128 (Plaintiffs' Exhibit 102-e), and excepting also the deduction from defendant's profit of the sum of $109,192.44 which represents defendant's officers' compensation allocated to the infringing products and which amount is part of the item "General and Administrative $615,061.32" given in said statement and as referred to in the testimony of defendant's accountant Philip Rootberg on November 15, 1961 at pages 104, 105, 110 and 125 and in his letter of March 1, 1960 (1961) (Plaintiffs' Exhibit 104), and excepting also the defendant's deduction of the loss as set forth in Plaintiffs' Exhibit 105 in the amount of $29,356.08.

The court allows the aforesaid deductions and finds the net profits before income tax assessment to be $455,293.01.

XIV. Roy H. Olson, Chicago patent attorney, whose qualifications were not questioned, testified as an expert in behalf of plaintiffs as to a reasonable royalty pursuant to Section 284 of Title 35 U. S. Code. Mr. Olson testified a reasonable royalty for the manufacture and sale of the patented device, and as manufactured and sold by the defendant and found to be infringements herein, would be not less than 10¢ per unit.

XV. Defendant called as a witness Stanley Hoods, house patent attorney for Ekco Products Company of

Chicago, manufacturer of household items, who testified that the average royalty paid or collected by his company for various household items was from 2.5% to 5% of selling prices. Mr. Hoods admitted, however, that the patents he had under consideration in his testimony included design patents and no statistics were given as to the percentage of design or mechanical patents or whether they had been adjudicated as valid and infringed as in the instant suit. Mr. Hoods testified that his company has no standard practice as to royalties which it charges or which it pays. The company evaluates each license on the facts pertaining to a particular case. He testified that an exclusive license calls for a royalty fee which is higher than for a non-exclusive license and where licensor is to have competition, a higher fee is required. In one case where Mr. Hoods' company paid a 5% royalty the patent in suit was subsequently found to be invalid and the license in that case was nonexclusive. Mr. Hoods testified that as long as there is a valid claim remaining in a patent the royalty is ordinarily continued even though some claims might be found invalid.

XVI. Defendant also called as a witness John D. Rumbough who testified that he was a former vice-president of The Enterprise Manufacturing Co. of Philadelphia, Pennsylvania, and, as such, negotiated a license under Zeller patent 2,623,563 for the manufacture and sale of an onion chopper known as the Swiss House which was in evidence at the trial of this cause and identified as Plaintiffs' Exhibit 25. Mr. Rumbough testified that the Swiss House chopper is no longer manufactured but during the term of the license and royalty was 2c per device which sold at $7.98 each less 50%. The license agreement under which Enterprise Manufacturing Co. operated was identified as Defendant's Exhibit 117 and it showed, among other things, that it included Canada as well as the United

States; and also Mr. Rumbough testified that the Zeller patent had not been adjudicated. Also the licensor sold to Enterprise $20,000.00 worth of inventory and equipment which was to be paid for by licensee by an additional royalty of 8¢ per device and not less than $2,000.00 per year. Failure to pay was cause for cancellation of the license. In addition Enterprise was to assume licensee's contracts for the purchase of parts and cartons as set forth in the written agreement, Defendant's Exhibit 117. Licensor agreed to supply to licensee, without cost or charge, certain art work, cuts, mats, electrotype and all advertising and publicity material relating to the food chopper as set forth in Paragraph 14. These and other variations are apparent from the written agreement, so that the Enterprise license is not helpful in determining a reasonable royalty in the instant case.

XVII. Samuel J. Popeil, president of defendant company, identified his patent 2,595,912 and a doughnut maker made of plastic by his company under said patent. The patent was never adjudicated. He identified a license agreement (Defendant's Exhibit 113) permitting D.R.M. Corporation to make doughnut makers of metal for a royalty of 2¢ per device. There is nothing in the agreement about the price of licensee's doughnut makers and Popeil retained for itself the right to make doughnut makers of plastic which sold for 47½¢ each.

XVIII. Lawrence C. Kingsland, former Commissioner of Patents, testified that a reasonable royalty under the Zysset patent claim 2 would be 1¼¢ per chopper. He stated that he based this opinion upon the testimony of Mr. Hoods which, as he heard it, was to the effect that 2½% on devices of this character would be reasonable.

Commissioner Kingsland's qualifications, experience and standing in the patent field were made a part of the record

and are unchallenged. The court attached much greater weight to his testimony than to that of the other witnesses. His opinion of a fair royalty, together with all of the facts and circumstances known to the courts in this cause, has brought this court to the ultimate conclusion that a fair royalty payment in this case is 4¢ for each of the 3,152,578 accused units sold by defendant.

XIX. An award to plaintiffs based only upon a reasonable royalty would be in conformity with the law. An award to plaintiffs based on reasonable royalty would, together with attorney's fees, be adequate compensation for defendant's infringement of the patent in suit, taking all things into consideration.

XX. When sold as retail shelf merchandise, without aid of a "sales pitch" or demonstration as Popeil did, plaintiff Zysset's commercial food chopper was not a commercial success in the United States. Only 3,883 units were shipped by plaintiff Zysset for sale in the United States during the six-year period from 1952 through 1957.

XXI. On June 12, 1958 defendant filed a counterclaim which charges plaintiffs Karl Zysset and New-Nel Kitchen Products Company, and, in addition, Arthur O. Nelson, individually and doing business as Crestline Products or Crestline Company; Harold Newman; and Crestline Products Company, a corporation; with breach of an alleged oral contract and unfair competition in connection with defendant's food chopper. Defendant, in that counterclaim, also alleged that it owned a trademark CHOP-O-MATIC and that the trademark is the subject matter of United States Trademark Registration No. 656,075. Additionally, defendant alleged that it owned unpublished manuscripts protected by United States Copyright Registrations Nos. C-9560, C-9637 and C-10296.

XXII. The contract which defendant alleges Nelson entered into with it was an alleged oral agreement relative to the sale by Nelson of Popeil's CHOP-O-MATIC devices. Nelson testified that there was a discussion about a proposed agreement to be submitted to him in writing. Several months after that discussion, and after Popeil submitted a proposed written agreement dated December 28, 1956 which contained several provisions never previously discussed between Nelson or anyone on his behalf, and Popeil Brothers. Nelson never signed or accepted the proposed agreement. Defendant was unable to produce any notes made at the meeting between Popeil and Nelson relative to the contents of the proposed written agreement. Mr. Popeil testified that there was no proposed agreement with Harold Newman or New-Nel Kitchen Products Company. The proposed agreement required Nelson, who was doing business under the name of Crestline Products, not to sell any competing choppers for a period of five years. Such provision would be in violation of the antitrust laws. Another of the provisions of the agreement was that it was to last five years. At the trial Popeil testified that the five-year period was to start at the time Nelson first started to sell Popeil's CHOP-O-MATIC devices in the summer of 1956; but, in a deposition previously taken, he testified that the five-year period was to start on December 28, 1956, which is the date of the proposed written agreement. The proposed agreement contained several other provisions which Nelson testified were not acceptable to him at the time he first saw the proposed agreement of December 28, 1956. Testimony was taken relative to the alleged oral agreement between Popeil Brothers and Arthur O. Nelson, doing business as Crestline Products, but, the evidence does not satisfy this court that there was any agreement of the nature charged by defendant entered at any time between

Popeil Brothers, on the one hand, and Arthur O. Nelson, individually or doing business as Crestline Products Co., on the other hand.

XXIII. No evidence was introduced which shows in any way that Arthur O. Nelson or any of the counter-defendants ever used, infringed, traded upon, disparaged or in any other way committed any act in violation of the rights anyone, including Popeil Brothers, may have in the name or trademark CHOP-O-MATIC. The evidence adduced does not establish that Popeil Brothers is the owner of Trademark Registration No. 656,075, a registration for CHOP-O-MATIC.

XXIV. No evidence was introduced to show that Nelson or any of the other counter-defendants ever used, copied, infringed or in any other way appropriated, any part of, or the whole of, any of the manuscripts corresponding to United States Copyright Registrations C-9560, C-9637 and C-10296.

XXV. The fact that Arthur O. Nelson may have had access to the copyrighted manuscripts and that one or two salesmen who purchased food choppers from Crestline Products observed a demonstration by Samuel Popeil or one occasion, and perhaps observed demonstrations of food choppers by persons selling CHOP-O-MATIC food choppers on other occasions, is insufficient to establish, and does not satisfy this court, that Arthur O. Nelson or any one of the other counter-defendants used that copyrighted material, or copied that copyrighted material either in verbal or in written form. In fact, the only direct testimony introduced by defendant Popeil Brothers on that point was through Mr. Samuel Popeil and he testified that no information ever came to him which indicated that Mr. Nelson or anyone working for Mr. Nelson,

or on behalf of Mr. Nelson ever made any use of the copyrighted manuscripts and that Mr. Popeil had no way of knowing whether Nelson had ever distributed such manuscripts or encouraged their use.

XXVI. In 1956 Popeil paid Crestline 10¢ on CHOP-O-MATIC choppers purchased by Crestline customers. Mr. Nelson testified that at the time Crestline was purchasing CHOP-O-MATIC's from Popeil it paid a price of $1.00 each and that Popeil said that in the event any of Crestline's customers ordered directly from Popeil, Crestline would be credited 10¢ per device, and to cover this Popeil would charge such customers $1.10 for each device. It appears from the testimony that the total credits in such matters amounted to several hundred dollars (no more than several thousand choppers); that the credits were given for sales prior to the issuance of the Zysset patent; and that the sales for which credits were given were not included in the infringing sales reported in the Popeil Statement of Account.

XXVII. There was no evidence introduced whatever as to the existence of any contract, or breach thereof, between Popeil and Karl Zysset, Popeil and New Nel Kitchen Products Company, Popeil and Harold Newman, and Popeil and Crestline Products Company, a corporation; and there was no evidence introduced in support of Popeil's charge of unfair competition by any of the counter-defendants disparaging Popeil Brothers' food choppers. It appears from the evidence that Mr. Samuel Popeil and Mr. Arthur O. Nelson discussed a contract, but that no contract was ever completed between Popeil Brothers and Arthur O. Nelson.

XXVIII. No evidence was introduced on the part of counter-defendants relating to damages which they might

have suffered as a result of the alleged acts of unfair competition, as a result of the acts and practices alleged to be in violation of defendant's purported copyright and trademark rights, and as a result of counter-defendant's purported breach of contract.

XXIX. On July 12, 1960 there was filed in the United States Patent Office a disclaimer, identified as Plaintiffs' Exhibit 109, of claim 1 of Zysset patent in suit 2,782,826 of February 26, 1957.

XXX. On May 18, 1962 defendant filed a motion to dismiss based on the plaintiffs' disclaimer identified as Plaintiffs' Exhibit 109.

XXXI. The parties have stipulated as to the reasonableness of the fees incurred by the plaintiffs herein as set forth in Plaintiffs' Exhibit 108. The court finds the services and disbursements reasonable under the circumstances of this case. The fair value of attorneys' fees so stipulated between the parties is $54,222.26, which are hereby found to be due and payable by the defendant to the plaintiff. (It is noteworthy to add that plaintiff (sic, should be defendant), has been allowed $42,830.59 for its attorneys' fees and disbursements.)

XXXII. The court finds that this is one of those rare cases in which an infringement has been a blessing in disguise; that only the skill, salesmanship and business acumen of defendant and its principal officer, Samuel Popeil, has brought a financial reward to the plaintiff in the form of a fortuitous windfall if this judgment is finally collected. The defendant did get legal counsel before acting in this case and that counsel was to the effect that plaintiff's patent was invalid.

For all the reasons herein set forth, the court does not allow any exemplary damages to the plaintiff. The court takes judicial notice of the fact that the defendant did

not in fact retain the whole amount of net profit, $455,293.01; that it is a corporation subject to corporate taxes which reduced the amount accordingly.

XXXIII. Plaintiffs are entitled to a judgment against defendant in the amount of One Hundred Twenty-six Thousand, One Hundred Three and 12/100 Dollars ($126,103.12) as damages for the infringement complained of and as set forth in the Judgment of October 3, 1958, as affirmed by the Court of Appeals on February 11, 1960, and as modified by the Court of Appeals on April 14, 1960, plus an additional sum of Fifty-four Thousand, Two Hundred Twenty-two and 26/100 Dollars ($54,222.26) for services and disbursements of plaintiffs' counsel, plus an additional amount of Two Thousand Dollars ($2,000.00) covering services and disbursements of plaintiffs' counsel since January 31, 1962. Plaintiffs are also entitled to taxable court costs to be fixed by the Clerk.

Conclusions of Law

1. As to an accounting in a patent infringement suit, the applicable statute relating to damages reads (35 U.S.C. 284):

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.
>
> The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances."

2. It is well established that a patent owner in a patent infringement action is entitled to recover the profits which the infringer has made by reason of his infringement. The defendant's costs of litigation, income taxes and salaries of officers in a closely held corporation are not properly deductible in arriving at the net profits to which the patentee is entitled. The court is required to make an award to the patent owner not less than a reasonable royalty for the use of the patented invention. The court has received expert testimony as an aid to the determination of damages as to the amount of a reasonable royalty under the circumstances in this case.

A reasonable royalty for the right to manufacture and sell vegetable choppers of the patent in suit during the period from February 26, 1957 to February 11, 1960 would be not less than 10¢ per device.

3. A manufacturer who continues to manufacture a patented device with knowledge of the patent but without a license does not have the right to demand, after having been held to infringe, that the measure of damages for his infringement is the amount which would have been a reasonable royalty for a license over the period of his infringement. The reasonable royalty referred to in the statute is not a limit to the amount of recoveries for infringement but is a lower limit which must be in any event awarded to the patent owner if there are not other satisfactory proofs of profits and damages resulting from the infringement. In this case, there is satisfactory evidence of the profits and gains which defendant made from its infringement and, under the evidence, the award to plaintiffs herein should not be limited to a reasonable royalty.

4. Defendant, in its counterclaim, charges plaintiffs with breach of contract and unfair competition arising

by reason of an alleged agreement between defendant, Popeil Brothers, Inc.; and Arthur O. Nelson, individually and doing business as Crestline Products. The defendant also charges counter-defendants with the commission of acts in violation of its alleged trademark rights and copyright rights. As far as Karl Zysset, New-Nel Kitchen Products Company and Harold Newman are concerned, there is no evidence which connects them with the alleged contract, with the alleged breach of contract, with any acts of unfair competition, or with any violation of copyright or trademark rights belonging to Popeil Brothers. No evidence as to damages was introduced by Popeil Brothers. Defendant's counterclaim as to Karl Zysset, New-Nel Kitchen Products Company and Harold Newman is dismissed.

5. In so far as Arthur O. Nelson, individually or in an business form including Crestline Products Company, a corporation, is concerned, the most that appears from the evidence, even looking at it most favorably to defendant, is that Nelson and Popeil Brothers discussed a contract which was to be reduced to writing by Popeil Brothers and that, without discussion with Nelson, Samuel Popeil and his attorney prepared a proposed agreement which included provisions which had not been discussed with Nelson and which, when submitted to Nelson, Nelson refused to execute. There was no contract of the character, alleged by defendant in its complaint, entered into between Popeil Brothers and Arthur O. Nelson, individually or in any business form. Nelson's refusal to execute the proposed agreement of December 28, 1956 was not an act of unfair competition, neither has defendant proved that Arthur O. Nelson, individually or in any business form, has in any way unfairly competed with defendant. Even if there were a contract, as alleged by defendant,

since that contract was to last for a term of five years, and since it was not in writing and is unsupported by any memorandum, it is unenforceable because of the Statute of Frauds. Furthermore, there is no evidence which supports defendant's charge that Arthur O. Nelson, or anyone on his behalf, made any use of defendant's trademark or copyrights, or in any way violated whatever rights and interests Popeil Brothers may have in the trademark CHOP-O-MATIC, and in Copyright Registrations Nos. C-9560, C-9637 and C-10296. As such, defendant's counterclaim should be dismissed as to Arthur O. Nelson, individually, and doing business as Crestline Products, or Crestline Products Company, a corporation.

6. The disclaimer filed by plaintiffs and identified as Plaintiffs' Exhibit 109 is a good and sufficient disclaimer under Section 253 of Title 35 U.S.C., and defendant's motion to dismiss based thereon should be denied.

JUDGMENT

Upon the record and proceedings, it is

Ordered:

1. That defendant's counterclaim be, and the same hereby is dismissed.

2. That defendant's motion to dismiss based upon the disclaimer be, and the same hereby is denied.

3. That plaintiffs have judgment in the sum of $126,103.12 as damages and $56,222.26 for services and disbursements of plaintiffs' counsel; making a total judgment of $182,325.38.

It is also ordered:

That the Clerk of this court tax plaintiffs' taxable costs and that the plaintiffs have judgment therefor.

ORDER OF DISTRICT COURT DENYING RELIEF FROM JUDGMENT

(Caption—Civil Action No. 57 C 763)

ORDER

This cause having come on to be heard before the Court upon defendant's Motion for Relief from Judgment Under Rule 60(b) and to hear alleged newly discovered evidence, and plaintiffs' objecting to the filing of said Motion and counsel having been heard and it appearing to the Court that the evidence alleged in said petition to be newly discovered even if timely presented with exercise of due diligence is not of such nature as to change the Judgment herein:

Now, therefore, It Is Ordered:

1. That said Motion and the filing thereof be and hereby is denied and refused. The question of costs and allowance for attorney's fees is reserved.

s/ J. S. Perry
Judge

November 13, 1962

EXCERPTS FROM TESTIMONY OF LAWRENCE C. KINGSLAND. (Taken from Consolidated Additional Appendix appearing in formal record. Side paging here is to pages of Consolidated Additional Appendix.)

13b My name is Lawrence C. Kingsland. I reside in St. Louis, Missouri.

14b I have engaged in the practice of patent and trademark law since 1908. I was Commissioner of Patents from September 1947 through the year 1949. I have also acted as special assistant to the Attorney General in charge of antitrust matters in which I had the re-

sponsibility for the patent questions. I have had other
15b assignments, one of which was through the State Department. I spent, in 1947, three months at Manila at the time the Philippine government was anxious to have a patent and trademark code drafted, and on the recommendation of the State Department I acted as adviser to the Philippine government. I am a member of the Patent Compensation Board of the Atomic Energy Commission.

24b Q. How does the rotation of the blade [of the patent in suit] relate to the wiping function of the blade as it passes through the slot of the wiper cup?

A. So far as the wiping function is concerned, whether or not it is rotatable makes no difference
25b whatsoever. That is, the function of the blade, the single sinuous blade, operating in the slot would perform that function just as effectively whether it was rotating or whether it wasn't rotating.

Q. Does this lack of relationship between the wiping function and the rotation function have any term in patent nomenclature?

A. Yes. We often refer to that as aggregative, and it certainly—where the function of the blades and its wiping function in the wiping plate is concerned, that's entirely separate as to whether or not the blade and plate rotate, and it's also of course very definitely separated from the subject matter as I see it in Claim 1.

Q. Do the structure and function of blade-wiping cause the indexing features of claim 1 to perform any new function in the combination?

A. There's no relationship between the function attributed to the blade operating in the slot, a sinuous blade or a zigzag blade, whichever one wants to call it,

that is an entirely independent functional relationship between those members, that has nothing to do whatsoever with whether or not they rotate in a particular way, that is, by indexing or whether they rotate freely by manual movement.

• • •

Q. Do you have any knowledge as to what the Patent Office examining practice is as to dependent claims?

26b • • • A. Well, to this extent: Where there is a dependent claim the practice is to examine for the basic subject matter expressed in the antecedent or base claim. Finding that allowable, it is the practice to allow dependent claims, because the dependent claim carries over into it all of the base claims, and therefore the examiners look at a dependent claim as merely a further limitation on the subject matter of the base claim.

• • •

Q. How do you know this?

A. I know this from my practice of over fifty years, prosecuting applications. I know it from discussions in the Patent Office, and I also know it from the decisions. It's just a— It's a well understood practice.

Q. Have you ever in your experience encountered a rejection of a dependent claim once the base claim has been allowed

A. No, because they are considered together, as I have explained. Once the base claim is allowable in the judgment of the Patent Office the dependent claim is carried along without any further discussion, and no rejection have I ever had of a dependent claim where the original claim was allowable.

Q. With respect to that customary practice I would like to ask you as to whether or not the practice was

followed in the prosecution of the Zysset patent in allowing claim 2, and I will ask you first, have you checked the Zysset file wrapper with respect to the subject matter expressing claim 2?

A. Yes, I think I said that, as to what I had done and I have checked it.

Q. Is there anything that has been stated in that file wrapper with respect to the subject matter of claim 2?

27b A. Yes, there was a— Originally, as I recall it, there were certain claims submitted which included among them the subject matter of what ultimately became claim 2. That is, it was directed to this continuous sinuous knife and the clearance—or cleaning-plate, wiper plate, with a sinuous slot in it, and that was claimed, and my recollection is that the Patent Office, the examiner at the time said that that in itself was not patentable subject matter.

Q. With respect to your last statement I would like to read to you from Plaintiffs' Exhibit 3, the file wrapper of the Zysset patent in suit:

* * *

* * * "The addition of a wiper or means to clear the blade or handle on the upward stroke thereof is held to be an obvious expedient which does not involve invention."

Is that the statement to which you had reference?

* * * *

Mr. Horton: I object, that this examination as to the file wrapper and the scope and interpretation of the claim is a matter which is not before your Honor and which cannot be before your Honor, in view of the mandate of the Court of Appeals, and it's strictly a question as to what the Wilson and McAllay patent

is, whether that is truly newly discovered evidence and whether that affects the judgment.

The Court: Well, I believe, Mr. Horton, if that is admissible, however, evidence on that, I think then they would be allowed to ask questions comparing the two patents. I think I will have to let it in. Objection overruled.

A. That was the statement that I had in mind, and simply illustrates, as I believe, what I understand to be the practice. In other words, later on I think you will find in that file wrapper after the examiner came
28b to the conclusion that what ultimately became claim 1 of the patent was allowable, then this same subject matter, which became subject matter of claim 2, was simply allowed as a matter of course, which followed the practice that I attempted to elucidate a few minutes ago.

The Court: Well, is it your testimony that they didn't thoroughly examine 2 but just allowed it to go in? Is that your opinion?

The Witness: No, I don't think it's a question of fairness at all. I think that the whole matter is this:—

The Court: I didn't mean fairness. I mean after they had allowed 1 to go in then, as I understand it, 2, being a dependent claim in your viewpoint, they didn't really examine into 2 because they thought it wasn't necessary. Is that what you mean?

The Witness: Well, what I mean is this: They don't go to the prior art after they have found that there is allowable subject matter and then a dependent claim is added, because the dependent claim tends to narrow subject matter which they have already found to be allowable.

(Exhibits From The Record Below)

PORTION OF PLAINTIFFS' EXHIBIT 3—
FILE WRAPPER OF PATENT IN SUIT

Claims of Original Application

415628—4

—5— 6048

What I claim as new and desire to secure by Letters Patent, is:

~~1. In a vegetable shredder comprising a bell-like housing adapted to be put over the goods to be shredded, and cutting means manually depressable by a spring-loaded actuating stem, said cutting means on each actuation being angularly movable by an automatically operating indexing device, the improvement defined by the provision of a socket in the upper portion of said housing, said socket having a plurality of internal helical grooves, and of a checking member mounted on the lower end portion of said stem, said checking member comprising two cam-engageable in~~

Plaintiffs' Exhibit No. 3.

~~said grooves and spring means adapted to prevent the cutting means from rotating when depressing said stem but allowing same to rotate in the last stage of its upward movement.~~

~~2. A vegetable shredder as set out in claim 1, in which the checking member comprises a sleeve rotatably but axially immovably mounted on the stem, the cams being formed integrally on said sleeve, and a helical torsion spring coiled about the stem, one end of said spring being anchored in said sleeve so that the spring is detached from the stem on depression thereof and frictionally engaged thereto on the upward stroke thereof in order to angularly rotate the stem and the cutting means carried thereby.~~

A

~~3. A vegetable shredder as set out in claim 1, in which housing is constituted of two interconnectable portions, and comprising a wiper rotatably but axially immovably mounted in the housing.~~

~~4. A vegetable shredder as set out in claim 3, in which the cutting means is a meander steel strip which passes through a continuous slot of said wiper.~~

415628—5

—6—

~~5. A vegetable shredder as set out in claim 4, in which a rod is secured to the lower end of the stem at right angles thereto, said rod passing in tight fit through a plurality of openings in said strip.~~

A

Insert A[1]

415628—6

Plaintiffs' Exhibit No. 3.

Paper No. 3

Address only The Commissioner of Patents, Washington 25, D. C.

All communications respecting this application should give the serial number, date of filing, and name of the applicant.

(Stamp) Mailed Oct 26 1954 Pat. Div. 5.

DEPARTMENT OF COMMERCE
United States Patent Office
Washington

Karl Zysset
c/o P. E. Baumann
Mythenstr. 5
Kilchberg B. Zch.
Switzerland

Please find below a communication from the Examiner in charge of this application.

Robert C. Watson,
Commissioner of Patents.
Applicant: Karl Zysset
Ser. No. 415,628
Filed Mar. 11, 1954
For Vegetable Shredder

This application has been examined.

References applied:

Hanel	2,140,010	Dec. 13, 1938	146-159
Suter (Switzerland)	155,720	Sept. 16, 1932	146-69

(1 sht. drwg., 3 pgs. spec.)

In the specification the brief description of Fig. 1 should state where this section is taken and an appropriate section line should be shown on the appropriate figure. The brief description of Fig. 3 should state where this section is taken and should further state that this view shows parts broken away.

Page 3, line 3, the "openings" should be provided with a reference character. Line 4, the "knife edge" should be provided with a reference character. Line 28, reference character "1o" should be changed to 10.

Plaintiffs' Exhibit No. 3.

Page 4, lines 24 to 29, the modification described should be shown on the drawing or reference thereto in the specification should be canceled.

Claim 1 and dependent claims 2 to 5 are rejected as being aggregative in form in that claim 1 recites elements without setting forth the structural relationship between these elements and the other elements recited in the claim. For

example, in line 10, the "spring means" has not been structurally related to any other element or elements recited in the claim. See In re Hall 614 O. G. 11; 1948 C. D. 534. The functional statement which follows the recitation of the "spring means" does not serve to structurally relate the "spring means" to the other elements recited in the claim.

Claims 1 and 3 are further rejected as being unpatentable over the disclosure of the patent to Hanel. The patent to Hanel shows a vegetable shredder which comprises a bell like housing 60 which is formed of two interconnecting portions 70a and 70b. A cutting means 75 is manually depressed to engage material being cut by means of the spring loaded actuated stem 72 and the hand member 82 at the upper end thereof. The member 70a is a checking member and the portions 78a are held to be the full equivalent of applicant's two cams which cooperated with the stem 72 to rotate the stem and blade during a certain portion of its movement. To place the spring 86 about the stem 72 instead of about the member 70a is held to be merely a matter of choice or design which does not involve invention.

Claims 4 and 5 are rejected as being unpatentable over the disclosure of the patent to Hanel in view of the disclosure of the Swiss patent 155,720.

The manner in which the Examiner applies the patent to Hanel to applicant's construction has been set forth above. To replace the blade at the lower end of the actuating member 72 of Hanel with a blade of the form shown by the Swiss patent 155,720 would not involve invention. In this connection attention is directed to the shape of the blade of the Swiss patent as illustrated in Figs. 2 and 5 of the Swiss disclosure.

Plaintiffs' Exhibit No. 3.

Serial No. 415,628 3

The addition of a wiper or means to clear the blade of Hanel on the upward stroke thereof is held to be an obvious expedient which does not involve invention.

Claims 1 to 5 are rejected.

No claims are allowed.

C. W. Robinson,
Examiner.

L.W.J.
L. W. Johnston:dc

415628—12

January 28, '55

6049

(Stamps) Mail Division Feb 10 1955 U. S. Patent Office. Received Feb 11 1955 Division 5 Paper No. 4/A.

G. H.

Pat. Div. 5
Ser. No. 415,628
Filed Mar. 11, '54
Apll.: Karl Zysset

The Commissioner of Patents,
Washington 25, D. C.

Dear Sir,

This is a response to the 1st O.a. of Oct. 26, '54. In the drawings, please insert the corrections given in the enclosed sketches. This, however, need not be done before a claim(s) is granted.

In the specification

page 2, line 14, please insert after "section"—substantially on the line 1-1 of Fig. 2—;
line 17, insert after "Fig. 1"—on the line 3-3 of Fig. 2 with parts broken away—;

page 3, line 3, after "openings" insert —8a—; line 4, after "edge" insert —8b—;

page 4, cancel the lines 24 to 29, line 25, cancel "the";

page 3, line 26, insert—helical—before "guide grooves".

Plaintiffs' Exhibit No. 3.

Claims: Cancel the claims 1 to 5 and write instead:

*(1) ~~6.~~ In a vegetable shredder comprising a two-part bell-like
per B housing *(HAVING AN UPPER AND A LOWER PORTION AND) adapted to be put over the goods to be shredded, and
a knife blade manually depressable by a spring-loaded actua-
" B ting stem *(WHICH HAS A LOWER END POR-
A¹ TION), said blade *(BEING MOUNTED ON THE LATTER AND) on each actuation being angularly movable by an automatically-operating indexing device, the improved indexing device including a socket in the upper housing portion, said socket having a plurality of internal helical grooves, and a checking member rotatably but axially immovably mounted on the lower end-portion of the stem, said checking member comprising a ring seated on said stem portion, a sleeve mounted on said ring and having two diametral cams engageable in said grooves, and a helical torsion spring disposed in said sleeve and coiled about said stem portion, one end of the spring being anchored in the sleeve and the other bearing on said ring; the whole in such combination that on depressing the stem the checking member in the first stage

A¹ is rotated in one direction relatively to the stem
Cont'd and the spring is disengaged from the latter, while the stem and kni-

* Matter in parentheses inserted.

Plaintiffs' Exhibit No. 3.

fe blade are not rotated, and that in the last stage of the
stem's upward movement the spring engages the stem and the
latter together with the checking member and knife blade are
rotated in the other direction.

•(2) ~~7~~. A vegetable shredder as set out in claim •(1) ~~6~~, in which the
knife blade is sinuous, a wiper cup is rotatably but axially
per B immovably mounted in the •(LOWER) ~~bottom~~ portion of the housing for
clearing the blade on the upward stroke thereof, said blade
" C passing through a continuous •(SINUOUS) ~~meander~~ slot in the bottom of
the wiper cup, and a blade-carrying rod passing in tight fit
" B through a plurality of openings in the blade •(AND BEING SECURED TO THE LOWER END PORTION OF THE STEM).

References applied:

Hanel's chopper has an action similar to that of my shredder, but its construction is complicated. The principal difference lies in the stem which comprises helix elements, whereas the stem in my shredder is a plain round rod. Hanel does not mention anywhere that the knife will rotate only in the last stage of its upward stroke.

Suter's knife (Fig. 5) is bent in z-form, while the knife in Fig. 2 is non-continuous but comprises three straight sections 8, only the knife-mount 7 being continuous.

Neither Hanel nor Suter show my carrier rod 7 nor my wiper cup 3.

I believe that my new claims 6 and 7 clear the Examiner's objections based on the references applied.

Yours very truly

Karl Zysset

Encl.:
2 sketches

A2 415628—14

• Matter in parentheses inserted.

PLAINTIFFS' EXHIBIT 109.

(Filed August 9, 1962)

U. S. DEPARTMENT OF COMMERCE
United States Patent Office

June 2, 1961

This Is To Certify that the annexed is a true copy from the records of this office of Disclaimer, filed July 12, 1960, in Patent 2,782,826, granted February 26, 1957, to Karl Zysset, for Vegetable Shredder.

By authority of the
Commissioner of Patents
/s/ F. R. Oliver
Certifying Officer.

(See memo July 29, 1960)

UNITED STATES PATENT OFFICE

Patentee — Karl Zysset
Patent No. — 2,782,826
Issued — February 26, 1957
Improvement — Vegetable Shredder

Patent Office
Jul 18 1960
Issue & Gazette
Branch
Recorded
U. S. Patent Office
Issue Division
Jul 12, 1960

To The Commissioner Of Patents:

DISCLAIMER

Your petitioners, Karl Zysset, residing at Lyss, Switzerland, a citizen of Switzerland, and New-Nel Kitchen Products Company, a corporation organized and existing under an by virtue of the laws of the State of Illinois, having its principal place of business at Chicago, Illinois, rep-

resent that they are, respectively, the patentee and legal owner of, and exclusive licensee to make, use and sell the patented invention under, said United States Letters Patent No. 2,782,826, issued to Karl Zysset for a certain improvement in Vegetable Shredder on February 26, 1957, and that they have reason to believe that, through inadvertence, accident or mistake and without any fraudulent or deceptive intention, claim 1 of said Letters Patent is too broad or is invalid as held by the United States Court of Appeals, for the Seventh Judicial Circuit on April 14, 1960, as reported in 125 USPQ 152. Your petitioners, therefore, hereby disclaim claim 1 in so far as it is a separate and independent claim of said patent pursuant to the said opinion and the mandate of the said Court of Appeals thereunder, but do not disclaim the wording of claim 1 in so far as it forms a part of claim 2 of said patent by reference, having regard to the holding of the said court that said claim 2 is valid.

Signed by Karl Zysset at Bern, Switzerland, this 6th day of July, 1960.

/s/. Karl Zysset

Witnesses:

.....

.....

Executed by New-Nel Kitchen Products Company at Chicago, Illinois, this 1st day of July, 1960.

New-Nel Kitchen Products Company
By /s/ A. O. Nelson
President

Attest:
/s/ Mabel Nelson
Secretary

Recorded
U. S. Patent Office
Issue Division
Jul 12 1960

Defendant's Exhibit No. 111

SUMMARY OF NEW-NEL QUARTERLY REPORTS TO ZYSSET OF FOOD CHOPPERS SOLD

Period	Net Units
May 15, 1958 — Aug. 15, 1958	1,740
Aug. 15, 1958 — Nov. 15, 1958	64,584
Nov. 15, 1958 — Feb. 15, 1959	19,835
Feb. 15, 1959 — May 15, 1959	13,446
May 15, 1959 — Aug. 15, 1959	18,547
Aug. 15, 1959 — Nov. 15, 1959	11,463
Nov. 15, 1959 — Feb. 15, 1960	9,460
Feb. 15, 1960 — May 15, 1960	9,091
May 15, 1960 — Aug. 15, 1960	10,576
Aug. 15, 1960 — Nov. 15, 1960	11,694
Nov. 15, 1960 — Feb. 15, 1961	10,086
Feb. 15, 1961 — May 15, 1961	15,584
May 15, 1961 — Aug. 15, 1961	12,861
Aug. 15, 1961 — Nov. 15, 1961	19,050
Nov. 15, 1961 — Feb. 15, 1962	11,928

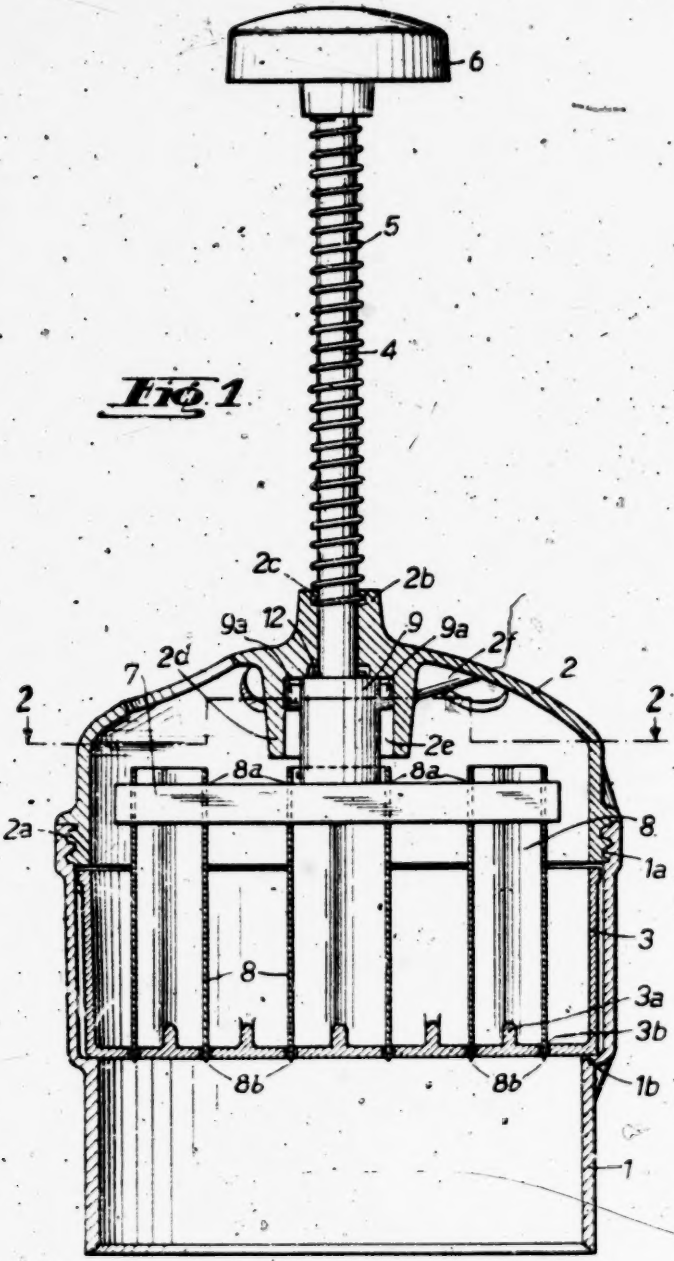
K. ZYSSET PATENT #2,782,826

Feb. 26, 1957 K. ZYSSET 2,782,826

VEGETABLE SHREDDER

Filed March 11, 1954 2 Sheets-Sheet 1

Fig. 1



K. ZYSSET PATENT #2,782,826

Feb. 26, 1957 K. ZYSSET 2,782,826

VEGETABLE SHREDDER

Filed March 11, 1954 2 Sheets-Sheet 2

Fig. 2.

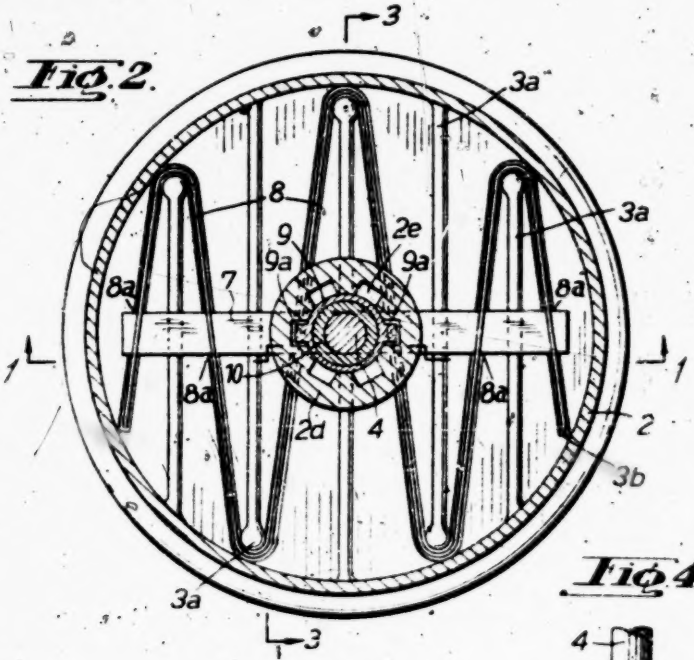


Fig. 4

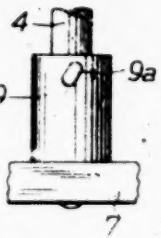
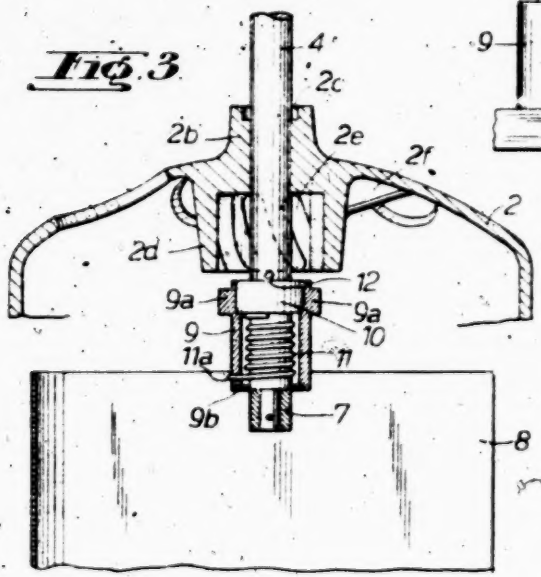


Fig. 3



K. ZYSSET PATENT #2,782,826

United States Patent Office

2,782,826
Patented Feb. 26, 1957

2,782,826

VEGETABLE SHREDDER

Karl Zysset, Lyss, Switzerland

Application March 11, 1954, Serial No. 415,628

2 Claims. (Cl. 146—160)

Manually operable vegetable shredders are known which comprise a bell-like housing adapted to be put over the goods to be shredded, and cutting means disposed in said housing and depressable by hand against the action of a spring, said means when actuated being rotated step by step with the aid of an automatically acting indexing device.

In such known shredders, the cutting means such as a steel blade provided with a knife-edge, at each upward or downward stroke is moved by the indexing device during the entire stroke.

Such known shredders, however, do not operate satisfactorily in that when the knife rotates during the entire upward stroke, the goods are angularly moved on their bed by the cutting means, thus rendering ineffective the stepwise rotation for its major portion. Such adverse conditions are aggravated when the knife rotates during the downward stroke. A further disadvantage of such known shredders is that the stem which carries the cutting means and the actuating member, has to be provided with helical grooves on a length at least equal to the stroke, whereby the manufacture of the shredder and the cleaning thereof is rendered complicated and difficult.

Said disadvantages are eliminated by the shredder disclosed by my present invention in that the cutting means are moved through a definite angle only in the last stage of the upward stroke.

In the shredder disclosed, the cutting means are constituted by a single sinuous steel strip passing through a continuous slot of a wiper cup which is rotatably disposed in the housing. If the wave line of such steel strip is made more or less sinuous, the shredded goods are prevented from being seized between the various sections of the meander knife. Such arrangement also eliminates the disadvantage arising in shredders having a stack of parallel knives.

To provide for easy cleaning of the shredder, the housing suitably is not made of one piece but rather of two portions detachable from each other, which when interconnected hold a wiper cup so that the latter is rotatable but not axially movable, whilst said wiper is readily removable when the two portions are disengaged from each other.

One form of my invention is shown in the accompanying drawings, in which—

Fig. 1 is a vertical section substantially on the line 1—1 of Fig. 2 in which the cutting means is in the raised position.

Fig. 2 is a horizontal section on the line 2—2 of Fig. 1.

Fig. 3 is a section similar to Fig. 1 on the line 3—3 of Fig. 2 with parts broken away, but in which the cutting means is in a partly lowered position, and

Fig. 4 is a partial view of a checking member which is turned through 90° from the position shown in Fig. 1.

The shredder shown comprises a bell-like housing made up of a lower portion 1 and an upper portion 2 of transparent plastic such as polystyrene. These two portions are interconnectable by means of threads 1a and 2a so

as to be readily detachable from each other for cleaning purposes. Housing portion 2 on top is formed with an integral depending boss or socket 2d on the inside of which are provided six helical grooves 2e. A plurality of ribs 2f reinforce the transition part between housing portion 2 and socket 2d. To the lower end of a stem 4 which is provided with a handle 6, is secured a prismatic rod 7 standing at right angles thereto. The rod 7 traverses without play a plurality of openings 8a of a meander steel strip 8. The latter is formed with a knife-edge 8b on the bottom and, when operating stem 6 is depressed, acts as a knife for shredding the goods put in the lower open space of the appliance. A compression spring 5 disposed between a recess 2c in a shoulder 2b of housing portion 2 and handle 6, after actuation of the latter returns blade 8 to its upper initial position.

A wiper cup 3 serves to clean the multiple-bent knife blade during the upward stroke thereof. In the operating position of the shredder, said wiper cup bears on a shoulder 1b of the cylindrical housing portion 1 and is freely rotatable when the two housing portions 1 and 2 are screwed together, but the wiper has practically no play in the axial direction. When the two housing portions are unscrewed, the wiper cup is readily removable. From the apex of a wave line formed by a slot 3b for knife blade 8, extend a plurality of stiffening ribs 3a from two sides, which brace the wiper cup.

As mentioned in the introductory part of the description, the shredder is provided with an automatic indexing device which acts to angularly move the cutting means. Said device, in contradistinction to known shredders, initiates the rotary movement only during the last stage of the upward stroke. Said device in the present case comprises on one hand the socket 2d with helical guide grooves 2e and, on the other hand, a checking member disposed on the lower end portion of stem 4. This checking member comprises a metallic ring 10 which is freely rotatable on stem 4, a sleeve 9 which is non-rotatable with respect to the latter and has two diametrically opposite cams 9a, and a torsion spring 11 coiled about stem 4 and of which the lower end 11a is anchored in sleeve 9. The latter is cast or pressed as one piece of splinterproof plastic such as "nylon." The checking member is prevented from axial movement on one hand through a stud 12 fixed to stem 4 and, on the other hand, through rod 7 against which abuts a metallic washer 9b of the checking member.

The shredder shown operates as follows. When depressing knife blade 8 by means of handle 6, the checking member is rotated owing to the cams 9a being engaged in two guide grooves 2e in the sense of separating the spring 11 from stem 4. The friction between the operator's hand and handle 6 is considerably greater than that between spring 11 and stem 4 so that knife blade 8 cannot rotate. After releasing the handle, the knife first moves straight upwardly under the action of spring 5. In the last stage of such upward movement, the cams 9a of the checking member are engaged in the guide grooves 2e. Owing to the rotary movement of sleeve 9 enforced thereby, spring 11 is put tightly about stem 4 whereby the latter is coercively rotated during the remaining stage of the upward stroke. After each operation of depressing knife 8, the latter is moved through a certain angle shortly before reaching its position of rest.

What I claim as new and desire to secure by Letters Patent, is:

1. In a vegetable shredder comprising a two-part bell-like housing having an upper and a lower portion and adapted to be put over the goods to be shredded, and a knife blade manually depressable by a spring-loaded actuating stem which has a lower end portion, said blade being mounted on the latter and on each actuation being

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angularly movable by an automatically-operating indexing device, the improved indexing device including a socket in the upper housing portion, said socket having a plurality of internal helical grooves, and a checking member rotatably but axially immovably mounted on the lower end-portion of the stem, said checking member comprising a ring seated on said stem portion, a sleeve mounted on said ring and having two diametrical cams engageable in said grooves, and a helical torsion spring disposed in said sleeve and coiled about said stem portion, one end of the spring being anchored in the sleeve and the other bearing on said ring; the whole in such combination that on depressing the stem the checking member in the first stage is rotated in one direction relatively to the stem and the spring is disengaged from the latter, while the stem and knife blade are not rotated, and that in the last stage of the stem's upward movement the spring engages the stem and the latter together with

the checking member and knife blade are rotated in the other direction.

2. A vegetable shredder as set out in claim 1, in which the knife blade is sinuous, a wiper cup is rotatably but axially immovably mounted in the lower portion of the housing for clearing the blade on the upward stroke thereof, said blade passing through a continuous sinuous slot in the bottom of the wiper cup, and a blade-carrying rod passing in tight fit through a plurality of openings in the blade and being secured to the lower end portion of the stem.

References Cited in the file of this patent

UNITED STATES PATENTS

2,140,010 Hanel ..... Dec. 13, 1938

FOREIGN PATENTS

155,720 Switzerland ..... Sept. 16, 1932

MANDATES

(Filed Aug 7 1963)

UNITED STATES OF AMERICA, SS:

The President Of The United States Of America

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division

(Seal of U. S. Court of Appeals, Seventh Circuit)

Greeting:

Whereas, lately in the United States District Court for the Northern District of Illinois, Eastern Division before you, or some of you, in a cause between Karl Zysset and New-Nel Kitchen Products Company, Plaintiffs, and Popeil Brothers, Inc., Defendant, District Court No. 57-C-763, a judgment was entered on the thirteenth day of July, 1962.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by Karl Zysset and New-Nel Kitchen Products Company agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the term of September, in the year of our Lord one thousand nine hundred and sixty-two, the said cause came on to be heard before the United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel

On Consideration Whereof, it is ordered and adjudged by this Court that in Appeals Nos. 13939 and 13940, the

judgment order entered July 13, 1962, be, and the same is hereby Reversed in so far as it awards damages and attorneys' fees and disbursements in the sum of $182,325.38, and costs; and that this cause be, and it is hereby Remanded to the said District Court with instructions to vacate that portion of its judgment order of July 13, 1962, and with directions to enter judgment for the plaintiffs in the sum of $636,672.12, without costs, but with interest from the date of its entry.

It is further ordered and adjudged by this Court that in Appeal No. 14007, the judgment order of the said District Court entered November 13, 1962, be, and the same is hereby, Affirmed.

It is further ordered that neither party is allowed costs in this Court in these appeals, in accordance with the opinion of this Court filed this day, Monday, June 3, 1963

And afterwards, to-wit, on the eighteenth day of June, 1963, there was filed in the office of the Clerk of this Court a petition for rehearing en banc, which said petition for rehearing en banc was denied on the seventeenth day of July, 1963.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said judgment notwithstanding. Witness, the Honorable Earl Warren, Chief Justice of the United States, the sixth day of August, in the year of our Lord one thousand nine hundred and sixty-three.

/s/ Kenneth J. Carrick
Clerk of the United States Court
of Appeals for the Seventh Circuit
By: /s/ Thomas F. Struhbe,
Deputy Clerk

(Mandate in Appeal 13940 is identical with above save for recital that the appeal was by virtue of "an appeal by Popeil Brothers, Inc.")